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SUPREME COURT, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE HON. TED POE,
Appellant

v.

ROBERT JACK COLLIER,
Appellee

Appeal From The Court of Criminal Appeals of Texas
Cause No. 69,739

JURISDICTIONAL STATEMENT

STANLEY G. SCHNEIDER
5300 Memorial, Suite 1000
Houston, Texas 77007
(713) 864-0362
Attorney for Appellant

T. DONALD MORAN
5430 Randon Road
Houston, Texas 77091
(713) 680-8462
Of Counsel

Alpha Law Brief Co., Inc. — 8748 Westpark — Houston, Texas 77063 — 789-2000

QUESTIONS PRESENTED

1. Do the victims of crimes or society as a whole have any federally-protected rights to due process that guarantee fundamental fairness to the prosecutor in a state criminal trial?

2. Does a state prosecutor have a federally-protected right of due process guaranteeing procedural rules identical to those of all other litigants?

3. Does a state prosecutor court have a federally-protected equal protection right to be treated like all other litigants?

4. Does the 14th Amendment guarantee of due process of law apply to a state prosecutor?

5. Is a state prosecutor, in his official capacity, a person under the 14th Amendment?

6. Has the Fifth Amendment guarantee of due process of law been incorporated by the 14th Amendment to apply to the states in cases involving a state prosecutor?

7. Does a state prosecutor have any federally-protected constitutional right to due process of law and equal protection?

8. Is the attorney for the state in a criminal prosecution a person under the Fifth and 14th Amendments and entitled to federally-protected due process rights?

LIST OF PARTIES

1. Appellant is the Hon. Ted Poe, Judge of the 228th Judicial District Court of Harris County, Texas.

2. Appellee is Robert Jack Collier, a defendant in the 228th Judicial District Court.

Other parties in interest include:

1. The Hon. Debra Danburg, member of the Texas House of Representatives and Collier's attorney of record.

2. The Hon. John B. Holmes, Jr., District Attorney of Harris County, Texas.

3. The Hon. Jim Mattox, Attorney General of Texas.

4. Jimmie Dale Collier, wife of Robert Jack Collier, and the complaining witness in Cause No. 459,914.

5. Doyelle Maines, the step-daughter of Robert Jack Collier, and the complaining witness in Cause No. 459,915.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	I
LIST OF PARTIES	II
LIST OF AUTHORITIES	IV
STATEMENT OF JURISDICTION	1
STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR FULL REVIEW	6
CONCLUSION	25
PRAYER	28
CERTIFICATE OF SERVICE	30
APPENDIX A (Opinion of the Court of Criminal Appeals)	1a
APPENDIX B (Findings of Fact)	33a
APPENDIX C (Notice of Appeal)	39a

LIST OF AUTHORITIES

CASES	Page
Alfred L. Snapp & Sons, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592 (1982)	20
Batson v. Kentucky, ____U.S.____, 106 S. Ct. 1712 (1986)	10, 14
Bordenkircher v. Hayes, 434 U.S. 357 (1978)	13
City of Trenton v. New Jersey, 262 U.S. 182 (1923)	6, 7
Collier v. Poe, No. 69,739 (Tex. Crim. App. May 20, 1987)	4
Georgia v. Tennessee Copper Co., 206 U.S. 618 (1907)	20
Government Services Insurance Underwriters v. Jones, 368 S.W.2d 560 (Tex. 1963)	14
Kelley v. Johnson, 425 U.S. 238 (1976)	25
Mapp v. Ohio, 367 U.S. 643 (1961)	10
McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)	9
Meshell v. State, No. 1339-85 (Tex. Crim. App. July 1, 1987)	10, 11, 12
Milvaine v. Coxe's Lessee, 8 U.S. (4 Cranch) 209 (1804)	16
Miranda v. Arizona, 384 U.S. 436 (1966)	10
New York v. New Jersey, 256 U.S. 296 (1921)	20
New York v. Quarles, 467 U.S. 649 (1984)	9
Noel v. State, No. 827-83 (Tex. Crim. App. March 14, 1984)	11
Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982)	9
Press-Enterprises Co. v. Superior Court, ____U.S.____, 106 S. Ct. 2735 (1986)	2
Shelley v. Kraemer, 334 U.S. 1 (1948)	13
Singer v. United States, 380 U.S. 24 (1965)	9, 12, 13
Solorio v. United States, 55 U.S.L.W. 5038 (U.S. June 25, 1987)	8
South Carolina v. Katzenbach, 383 U.S. 301 (1966)	7, 8, 15
United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936)	16
United States v. Salerno, ____U.S.____, 107 S. Ct. 2095 (1987)	23
United States v. Thompson, 98 U.S. 486 (1879)	16
United States Trust Co. v. New Jersey, 431 U.S. 1 (1977)	7
Wainwright v. Witt, 469 U.S. 412 (1985)	9
Waites v. Sondock, 561 S.W.2d 772 (Tex. 1977)	4, 6, 22, 24, 25
Young v. United States ex rel. Vuitton Et Fils S.A., ____ U.S.____, 107 S. Ct. 2124 (1987)	12, 13

Page

STATUTES AND CONSTITUTIONS

28 U.S.C. section 1257(2) 2
Fed. R. Evid. 412 22
Tex. Civ. Prac. & Remedies Code Ann. section 30.001 14
Tex. Civ. Prac. & Remedies Code Ann. section 30.003 .....
.....1, 2, 3, 4, 22, 24, 27
Tex. Civ. Stats. Ann. art. 2168a (Repealed) 4
Tex. Code Crim. Proc. Ann. art. 2.01 12
Tex. Code Crim. Proc. Ann. art. 3.02 12
Tex. Code Crim. Proc. Ann. art. 32A.01 11
Tex. Code Crim. Proc. Ann. art. 38.22 27
Tex. Code Crim. Proc. Ann. art. 38.23 27
Tex. Code Crim. Proc. Ann. chapter 56 ..... 14, 20
Tex. Code Crim. Proc. Ann. art. 56.02(a)(1) 21
Tex. Code Crim. Proc. Ann. art. 56.02(a)(2) 21
Tex. Code Crim. Proc. Ann. art. 56.02(c) 14
Tex. Code Crim. Proc. Ann. art. 56.04 14
Tex. Const. art. I, section 1 (1845) 17
Tex. Const. art. I, section 1 (1861) 18
Tex. Const. art. I, section 1 (1866) 18
Tex. Const. art. I, section 1 (1869) 18
Tex. Const. art. I, section 2 18
Tex. Const. art. I, section 9 27
Tex. Const. art. I, section 10 27
Tex. Const. art. III, section 5 2
Tex. Const. Preamble (1836) 17
Tex. Const. Preamble (1845) 17
Tex. Govt. Code Ann. section 43.180 14
Tex. Penal Code Ann. section 1.02 21
U.S. Const. art. I, section 8, cl. 14 8
U.S. Const. art. I, section 10 7
U.S. Const. art. III 8
U.S. Const. art. IV, section 4 ..... 7, 27
U.S. Const. amend. V 2, 8, 13, 24, 27
U.S. Const. amend. VI 27
U.S. Const. amend. XIV, section 1 .....3, 7, 13, 19, 21, 24, 25

OTHER AUTHORITIES

W. Prosser, *Handbook of The Law of Torts*, 573 (4th ed. 1971) 20

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Appeal From The Court of Criminal Appeals of Texas
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JURISDICTIONAL STATEMENT

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. section 1257(2).

This is an appeal from a decision of the Texas Court of Criminal Appeals conditionally granting a writ of mandamus requiring the Hon. Ted Poe to grant a legislative continuance pursuant to TEX. CIV. PRAC. & REMEDIES CODE ANN. section 30.003. Judge Poe con-

tended at the Court of Criminal Appeals that section 30.003 violates the prosecutor's and victim's right to due process in criminal cases. The decision of the Court of Criminal Appeals was issued May 20, 1987, and was in favor of the validity of the state statute.

If, however, this Court determines that it lacks appellate jurisdiction, Appellant prays that this Court consider this document as a petition for certiorari under 28 U.S.C. section 1257(2).

Although the Legislature may be out of session by the time this Court considers the instant case, the case will still present a case or controversy under U.S. CONST. art. III. This controversy is capable of repetition yet evading review because of the short legislative sessions in Texas. *Press-Enterprise Co. v. Superior Court,* ____ U.S.____, 106 S. Ct. 2735, 2739 (1986). *See also,* TEX. CONST. art. III, section 5, describing the Texas scheme for limitations on the length of legislative sessions.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. amend V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of a Grand Jury, except in cases arising in the land and naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. XIV, section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TEX. CIV. PRAC. & REMEDIES CODE ANN. section 30.003(b)

Except as provided by Subsection (c), at any time within 30 days of a date when the legislature is to be in session, at any time during a legislative session, or when the legislature sits as a constitutional convention, the court on application shall continue a case in which a party applying for the continuance or the attorney for that party is a member of the legislature and will be or is attending a legislative session. The court shall continue the case until 30 days after the date on which the legislature adjourns.

STATEMENT OF THE CASE

This case arose from the refusal of the Hon. Ted Poe to grant a continuance in the *The State of Texas v. Robert Jack Collier,* Nos. 459,914 and 459,915. Collier is charged with attempted murder and aggravated assault.

All parties agree that the Hon. Debra Danburg, a member of the Texas House of Representatives, was retained as co-counsel more than 10 days before the case was set for trial and that she properly sought a legislative continuance pursuant to TEX. CIV. PRAC. & REMEDIES CODE ANN. section 30.003.

Judge Poe denied the continuance after a hearing in which it was determined that Collier was free on bond and that his wife and 16-year-old stepdaughter, the complainants in each cause, feared for their lives because Collier was free. Judge Poe also found that Rep. Danburg was not Collier's lead counsel and that the only appearance she made was to file a motion for a legislative continuance.

Judge Poe's findings of fact are included as Appendix B to this jurisdictional statement.

The Texas Court of Criminal Appeals granted Collier leave to file a motion for writ of mandamus and conditionally granted the writ, requiring Judge Poe to vacate his order denying the continuance in each cause number. *See, Collier v. Poe,* No. 69,739 (Tex. Crim. App. May 20, 1987) (Not yet reported).

The Court of Criminal Appeals declined to follow *Waites v. Sondock,* 561 S.W.2d 772 (Tex. 1977), in which the Texas Supreme Court found that there was a federally-protected due process right to void legislative continuances if there would be irreparable harm to the non-moving litigant. *Waites* interpreted TEX. REV. CIV. STATS. ANN. art. 2168a, a predecessor statute to section 30.003.

Judge Poe's findings of fact based on a hearing held on January 2, 1987, that show irreparable harm to the victims and the prosecuting attorney because of the granting of the statutory legislative continuance include:

> 18.(b) State's witness, Raymond Gowdey, is afraid of the defendant and fearful for the safety of his wife and baby. The Gowdeys moved from their

home on a belief that harm could come to them by the defendant. The defendant allegedly made some prior threats to Raymond Gowdey.

18.(c) The complainant, Jimmie Dale Collier, is an alleged gunshot victim and wife of the defendant (459914). She is fearful for the safety of herself and her family. She has "hidden" her children in different cities and she has moved around for fear of her safety and her family's safety because of the defendant. She has left the State of Texas for a period of time due to this fear.

18.(d) Jimmie Collier does not believe she would be "here" if the trial was postponed until mid-1987 because she believes she would be killed by the defendant or she would be "committed."

18.(e) When she testified, she was visably shaken. She cried, she was trembling. She found it difficult to speak. She is afraid for her safety and the safety of her family because of the defendant.

18.(f) She is seeking medical treatment for her nervous condition because of this offense.

18.(g) The witness feels her condition is getting worse because of this offense.

18.(h) The witness Doyelle Maines is the stepdaughter of the defendant and an alleged gunshot victim. She is 16. She moved because of her fear of the defendant and that he could "do it again." She cannot sleep at night because of the offense. She is separated from her mother until the case is disposed of for fear of the defendant.

18.(i) The witness Maines appeared distraught during her testimony and appeared to believe harm would come to her by the defendant if the case was postponed until mid-1987.

The Court of Criminal Appeals specifically rejected the argument that *Waites* applies to criminal cases on the theory that the State has no state or *federal constitutional right to due process*. Slip Op. at 23-25. (emphasis added)

REASONS FOR FULL REVIEW

The questions presented are essentially whether the State of Texas, and as alter ego representing society in general, the public prosecutor and the individual victims of crimes has a federally-protected procedural due process right to a fair, speedy adjudication of criminal charges and whether the State, representing society, the public prosecutor and the vicitims of crimes has a federally-protected equal protection right to be treated like all other litigants to a trial in state court including the right to all the procedural safeguards that apply to other litigants in trials, both civil and criminal.[1]

In Some Contexts, States and Their Subdivisions Have No Right to Due Process

This Court has long held that a state may at will change its grants of powers to political subdivisions such as city charters without implicating the city's "due process right." In fact, this Court has squarely held that in that situation, the political subdivision has no federally-protected due process right to invoke against the state that created it. *City of Trenton v. New Jersey*, 262 U.S. 182, 188 (1923).

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1. It should be noted that the office of the Texas Attorney General, representing the State of Texas, filed an amicus brief on behalf of Appellee Collier, and the Harris County District Attorney's office representing the State of Texas, filed a "response" on Judge's behalf in the Court of Criminal Appeals.

Appellant asserts that *City of Trenton* and its progeny simply hold that a state may change the power and authority it grants its creatures without implicating the creature's "federal" rights and thereby, they are not determinative in the instant case.

So long as there is a Republican form of government, states are free to organize their internal operations in any manner each state sees fit. U.S. CONST. art. IV, section 4.

Conversely, while state government subdivisions have no federal constitutional right to protest a change in the statutes governing a state political subdivision, under some circumstances such changes in state law can give rise to a private cause of action for specific harm. *United States Trust Co. v. New Jersey,* 431 U.S. 1 (1977).

While *United States Trust* was based on the contracts clause, U. S. CONST. art. I, section 10, the contracts clause is a form of due process required before the general constitutional requirements of due process were adopted in the Bill of Rights and the 14th Amendment. *United States Trust* also is an example of the interaction between private and public interests and how a form of due process can arise as to a private party in circumstances in which there is no right in the public body directly effected.

The Court of Criminal Appeals Relied on Overly Broad Language in this Court's Dicta

In *South Carolina v. Katzenbach,* 383 U.S. 301, 323 (1966), this Court used broad, sweeping language to hold that states are not protected under the Fifth Amendment's

right of due process. However, a review of the full opinion shows that the language was unnecessary to this Court's decision because it was in fact based on a specific power granted to Congress by the Constitution. 383 U.S. at 326-27.

Katzenbach involved the application of the 15th Amendment and the broad power granted to Congress to enforce the rights of racial minorities to vote. The Court said that the states do not have a due process right in a case involving an administrative function based on an extremely broad constitutional grant of authority to Congress.

Similar specific grants of authority to Congress have long been held to give the Government powers and authority in some contexts that would be unacceptable in the absence of such a specific grant. For example, under the grant of power in U. S. CONST. art. I, section 8, cl. 14, Congress has the power to "make rules for the Government and Regulation of the land and Naval Forces." This Court has broadly interpreted that power to include the right to try service members before courts martial presided over by non-Article III judges without lifetime tenure protections. See, e.g., *Solorio v. United States,* 55 U.S.L.W. 5038, 5039 (U.S. June 25, 1987). Absent that specific grant of authority, the military defendant would be deprived of his Fifth Amendment right of due process by the operation of the Uniform Code of Military Justice. Presiding over the trials of criminal defendants and, at times, assessing the punishment is, of course, a judicial power reserved to Article III judges. But, exercise of a judicial function by a non-Article III official is acceptable in courts martial because of Congress' power to regulate the armed forces. *See also,*

Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

The validity of the Voting Rights Act, the Uniform Code of Military Justice, and other statutes is based on the exercise of a specific grant of power to Congress by the Founding Fathers in the text of the Constitution. Congress is given broad latitude in selecting the means of exercising that power so long as the means selected are proper and related to the exercise of the power. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

This Court Has Held That Prosecutors Have Rights to Fundamental Fairness

In numerous contexts, this Court, without specifically saying prosecutors and governments have a right to due process, has held that prosecutors for either a state or the federal government are entitled to fair and equal treatment in a criminal trial. Important examples in recent years include:

— The right to prevent a non-jury trial in order to ensure a fair adjudication for the Government. *Singer v. United States*, 380 U.S. 24, 36 (1965). The government attorney in a criminal case is not an ordinary party to a controversy but a servant of the law who has special duties. 380 U.S. at 37.

— The right to a jury that can administer a constitutional capital sentencing scheme. *Wainwright v. Witt*, 469 U.S. 412 (1985).

— A limited right to interlocutory appeals to this Court by states if there is no other way to present their federal constitutional claim. *New York v. Quarles*, 467 U.S. 649, 651 n. 1 (1984).

Conversely, the Court has recognized areas in which the prosecuting authority is denied the right to be treated as all other litigants are treated. But, in each of those instances, this Court's limitation on the state is based on a specific Constitutional provision guaranteeing special rights to defendants in criminal prosecutions. Some examples from recent years include:

— Special procedural rules to be applied in the admission of statements of the defendant based on custodial interrogation. *Miranda v. Arizona,* 384 U.S. 436 (1966).

— A ban on introduction by the state of evidence seized from the defendant in violation of the Fourth Amendment. *Mapp v. Ohio,* 367 U.S. 643 (1961).

— The prohibition of the use of peremptory challenges to exclude members of racial and ethnic minorities from juries. *Batson v. Kentucky,* ____U.S.____, 106 S. Ct. 1712 (1986).

Taken together, the two lines of cases lead to a single conclusion. Government, either a state or the United States, is entitled to be treated like all other litigants so long as there is no specific Constitutional grant of power or limitation of power. A government is entitled to the same fundamental fairness accorded all litigants unless there is a specific Constitutional reason to deny it.

Although this Court has never used the term as such, this entitlement to fundamental fairness is a right to due process.

After the instant case was decided by the Court of Criminal Appeals, that Court recognized that the state can be protected by constitutional doctrines to the detriment of a criminal defendant's statutory rights. *Meshell*

v. State, No. 1339-85 (Tex. Crim. App. July 1, 1987) (Declaring state Speedy Trial Act unconstitutional under separation of powers doctrine in the Texas Constitution). *Meshell* also *sub silentio* recognized that the State of Texas, as a litigant in its own courts, has a right of due process by allowing it to raise error for the first time on appeal. In the past in Texas, only criminal defendants have been entitled to raise error for the first time on appeal.

In *Noel v. State,* No. 827-83 (Tex. Crim. App. March 14, 1984), the Court held that the State could not challenge the constitutionality of the Speedy Trial Act, TEX. CODE CRIM. PROC. ANN. art. 32A.01 et seq., because it had not properly raised the issue in the District Court. The Court further held that while the doctrine of "fundamental error" is available for a defendant to challenge the constitutionality of a statute for the first time on appeal, the doctrine does not apply to the State because the doctrine is based on due process and the State has no right of due process.

At the trial court level, *Meshell* is identical to *Noel.* The State in *Meshell* also failed to raise the constitutionality of the Speedy Trial Act in the trial court, Slip Op. at 7-8. The Court of Criminal Appeals therefore recognized the State's right to utilize the fundamental error doctrine and by necessary implication, the State's right to due process.

The Prosecuting Attorney Is Both a Representative of the Sovereign and a Party to the Litigation

As the Court of Criminal Appeals noted in the instant case, all criminal cases in Texas are prosecuted in the

name of the State of Texas. Slip Op. at 23, citing TEX. CODE CRIM. PROC. ANN. art. 3.02. However, they are prosecuted by individual attorneys representing the State. *Id.* citing TEX. CODE CRIM. PROC. ANN. art. 2.01. And, it is clear both from the holdings of this Court and the Court of Criminal Appeals that the prosecuting attorney is more than an attorney representing a client. He has specific rights that inure to him as an individual because of his status as a public prosecutor.

This Court in *Singer v. United States,* 380 U.S. 24, 37 (1965), noted that the "government attorney in a criminal prosecution is not an ordinary party to a controversy but 'a servant of the law'. . . ." It follows directly that if the government attorney is not an ordinary party to a lawsuit, he is a party nonetheless, a party with special rights and responsibilities[2] and not simply the lawyer for the litigant.

The dual responsibilities of the public prosecutor again was noted by this Court in *Young v. United States ex rel. Vuitton Et Fils S.A.,* ___ U.S. ___, ___, 107 S. Ct. 2124, 2135-36 (1987), wherein this Court recognized that the public prosecutor must balance society's interest with the interests of the individual directly affected by the offense but that society's interests must be paramount. *Id.*

The Court of Criminal Appeals noted this special role of lawyer-litigant under Texas law in *Meshell v. State,* No. 1339-85 (Tex. Crim. App. July 1, 1987). As the Court noted:

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2. Each district attorney shall represent the State in all criminal cases in the district courts of his district and in appeals therefrom. . . . TEX. CODE CRIM. PROC. ANN. art. 2.01.

> If the Act were enforced against the Freestone County Attorney in the instant case, he would be deprived of his exclusive prosecutorial discretion in preparing for trial without any consideration for the factors used in determining whether appellant had been deprived of his constitutional right to a speedy trial. Slip Op. at 19 (emphasis added)

The Court of Criminal Appeals' holding is in accord with this Court's holdings in *Singer* that a prosecutor is in fact more than an attorney representing a party to a lawsuit. He has independent rights, duties, discretion and responsibilities by his status. *Accord, Bordenkircher v. Hayes,* 434 U.S. 357 (1978).

Therefore, even if states do not have a right of due process, the prosecutor is a person under both the Fifth and 14th Amendments and he is entitled to due process.

The State in a Criminal Trial is Represented by More Than the Prosecutor

There are two representatives of government in the courtroom during any criminal trial. Each is independent of the other and each has mutually exclusive duties.

The trial court and the judicial branch of government, either state or federal, are the government and their actions are governmental actions. *Shelley v. Kraemer,* 334 U.S. 1 (1948). It is the judicial branch of government that adjudicates controversies and issues enforceable orders, whether they be to pay money damages in a civil case or to confine a convicted defendant in a criminal case while it is the duty of the executive to enforce those orders. *Accord, Young v. United States ex rel. Vuitton et Fils S.A.,* ____U.S.____, 107 S. Ct. 2124 (1987).

The prosecutor, whether his status is that of independent litigant or representative of the sovereign, also is a governmental actor. *Batson v. Kentucky*, ____U.S.____, 106 S. Ct. 1712 (1986).

The third branch of government, the legislative branch, is responsible for the laws that are enforced in the courts and the procedural rules used in the courts. In the instant case, TEX. CIV. PRAC. & REMEDIES CODE ANN. art. 30.001 is such a procedural rule properly adopted by the Legislature. *Government Services Insurance Underwriters v. Jones*, 368 S.W.2d 560 (Tex. 1963).

It necessarily follows that the legislative and judicial branches are the primary representatives of the government in any criminal litigation. It is the legislature that adopts the statutes that are the basis of the case and the judiciary that issues the orders to enforce those statutes. The prosecutor is both the litigant who presents allegations of statutory violations to the judiciary for the judiciary's determination and the representative of the sovereign.

In addition, he represents the interests of the individual victims of the crime. Under Texas law, for example, victims and close relatives of victims have certain statutory rights, see generally TEX. CODE CRIM PROC. ANN. chapter 56. The local prosecuting attorney is the state official responsible for protecting the rights of the victim guaranteed under Chapter 56, TEX. CODE CRIM PROC. ANN. arts. 56.02(c) and 56.04. In Harris County, the district attorney is the official charged by state law with protecting those rights in all criminal cases. TEX. GOVT. CODE ANN. section 43.180.

In sum, by state law, the prosecuting attorney in the instant case has the responsibility under state law of 1)

personal control over the case, making him a litigant; 2) representation of the State of Texas in criminal cases; and 3) representing the victims of the crimes. Of course, the three duties imposed by law can at times create frictions.

If *South Carolina v. Katzenbach,* 383 U.S. 301 (1966) is correct in its holding that states have no right to due process, then the Court must have been discussing the states as sovereign entities. In the instant case, the sovereignty of the State of Texas was represented by Judge Poe, the trial court. The assistant district attorney is simply the representative of a litigant. As such, he and the victims he represents are entitled to due process and equal protection.

The Legislature and the courts may not deprive the prosecuting attorney and the victims of a fair adjudication process under procedural rules that apply to all other litigants.

In Texas, the Citizens Possess Sovereignty to a Unique Extent

With the exception of Texas, each of the states was created and became sovereign through an external grant of limited sovereignty. In some cases, such as the 13 colonies, the original grant of power came through a Royal Charter from the Crown. In other cases, states were carved out of territory purchased from foreign nations such as the Louisiana Purchase or through conquest by the federal union.

The other states, including the original 13 states, never had full sovereignty.

At one time, it was the accepted view that the 13 original states were sovereign, independent nation states

at the time they declared their independence and only later did they surrender part of their sovereignty to the central government. *United States v. Thompson*, 98 U.S. 486 (1879). *Milvaine v. Coxe's Lessee*, 8 U.S. 4 (Cranch) 209 (1804). However, the better and more recent view is that by the Declaration of Independence, sovereignty passed from the Crown not to the individual colonies but to the colonies as a unit, acting in their collective and corporate capacity as the United States of America. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316-17 (1936).

The ultimate sovereignty resided not in the 13 states but in the Continental Congress. "When, therefore, the external sovereignty of Great Britain in respect to the colonies ceased, it immediately passed to the Union." *Id.*

The limited sovereignty retained by the State of Texas, however, flows directly from its people. In 1836 the Republic of Texas won its independence at the Alamo and San Jacinto. The people of Texas relied on no Royal Charter or collective governmental action to win their sovereignty. They did not rely upon Congress to carve their state from territory won in battle by the United States or purchased by the central government. For a decade, Texas was an independent nation and only upon its annexation in 1845 did it give up some of the powers and attributes of sovereignty, including the power to wage war and conduct foreign relations.

Throughout the subsequent history of Texas, its people have recognized this unique status in each of the subsequent constitutions adopted by them. Each constitution of Texas, beginning with that of the Republic of Texas—adopted in Convention while the Revolution was still

being waged—recognized that sovereignty came in full measure from its citizens. The Constitution of the Republic of Texas included the following preamble:

> WE, the People of Texas, in order to form a government, establish justice, insure domestic tranquillity, provide for the common defence and general welfare; and to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution: TEX. CONST. Preamble (1836).

This unique status was next recognized by Texans in their Constitution of 1845, on the occasion of the Annexation of the Republic of Texas into the United States. The first Texas state constitution began:

> WE, the People of the Republic of Texas, acknowledging with gratitude the grace and beneficence of God in permitting us to make [a] choice in our form of government, do in accordance with the provision of the Joint Resolution for annexing Texas to the United States, approved March 1, one thousand eight hundred and forty-five, ordain and establish this Constitution. TEX. CONST. Preamble (1845).

That Constitution, and all subsequent Constitutions of the State of Texas, recognized the ultimate sovereignty of the people. The acknowledgement has been carried forward from constitution-to-constitution throughout Texas' history. In the first state constitution, it read:

> All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit; and they have at all times the unalienable right to alter, reform, or abolish their form of government, in such manner as they may think expedient. TEX. CONST. art. I, section 1 (1845).

The Constitution of 1861 used even stronger language to recognize the ultimate sovereignty of the people of Texas. It provided:

> All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit; and they have at all times the inalienable right to alter, reform, or abolish their form of government, in such manner as they may think expedient; and therefore, no government or authority can exist or exercise power within the State of Texas, without consent of the people thereof previously given; nor after that consent be withdrawn. TEX. CONST. art. I, section 1 (1861).

The next Texas Constitution included language identical to that of the 1845 Constitution. TEX. CONST. art. I, section 1 (1866). The 1869 Texas Constitution recognized the supremacy of the United States Constitution and national authority embodied in the federal constitution. TEX. CONST. art. I, section 1 (1869). The current Texas Constitution provides:

> All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit. The faith of the people of Texas stands pledged to the preservation of a republican form of government, and, subject to this limitation only, they have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think expedient. TEX. CONST. art. I, section 2.

This unique relationship between Texans and their state government creates a unique status for the public prosecutor who represents the "State" in criminal prosecutions. The public prosecutor in Texas, more than the

public prosecutor in any other state, is a direct representative of the people rather than of a political entity which must trace its roots back to a grant of authority from another sovereign.

While Texas' history does not, of course, give it a relationship with the federal government and the Union that is different than that of any other state, it gives the people of Texas a special relationship with their public prosecutor. That public prosecutor ultimately derives his authority from those individual citizens.

And, those individual citizens are "persons" under the 14th Amendment. They have the right of due process under the 14th Amendment and the prosecutor, since he is representing them, can invoke their due process rights just as any other lawyer can invoke his clients' rights on their behalf.

In a Criminal Trial, the State is Both Litigating Its Own Rights and Acting in *parens patriae*

As noted above, a criminal trial combines two distinct but related interests. A government, acting through its prosecutor, is representing its own sovereign rights to preserve order and enforce its own laws. And, it is exercising quasi-sovereign rights by enforcing the rights of the individual victims of crimes. It provides a forum to adjudicate those rights and it provides a prosecutor to enforce them.

And, the legislatures and courts provide a procedural framework to adjudicate all of those claims.

It is well settled that states may maintain suits in federal court as *parens patriae* in matters which are traditionally held to be exercises of soverign authority.

The most common examples are what this Court has termed "public nuisances" such as abatement of pollution. *New York v. New Jersey*, 256 U.S. 296 (1921). And, states may sue private parties in *parens patriae*. *Georgia v. Tennessee Copper Co.*, 206 U.S. 618 (1907).

In the recent case of *Alfred L. Snapp & Sons, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982), this Court examined at length the requirements for a state to maintain a *parens patriae* lawsuit in federal court. However, the underlying principles apply to actions in state court. The state is the parent of its citizens and can maintain an action to preserve their rights.

Of importance to the instant case is the special nature of a public nuisance such as that at issue in *New York v. New Jersey*. Like a criminal case, individual citizens may not prosecute suits for public nuisance. Abatement of public nuisances is the duty of the public prosecutor. In fact, some authorities consider the public nuisance to be a form of "catch-all criminal offense, consisting of an interference with the rights of the community at large. . . ." W. Prosser, *Handbook of The Law of Torts*, 573 (4th ed. 1971). It follows that if a state sues in *parens patriae* to abate a public nuisance, it sues in *parens patriae* to prosecute a criminal offense.

Criminal trials are perhaps the ultimate example of *parens patriae*. And, since the state's actions is to litigate both its rights and the rights of its citizens as a whole as well as the rights of the individual citizen-victim, the rights and interests of persons are affected.

Interests Protected

The Texas Legislature's actions in Chapter 56 of the Texas Code of Criminal Procedure have guaranteed

victims of crimes in Texas certain procedural and administrative rights and made the prosecuting attorney the primary state agent for ensuring that the rights of the victim are protected and respected. It is an example of the State of Texas acting in *parens patriae* to the individual citizen in a criminal trial.

The Legislature's actions are a recognition that both the public as a whole and the individual victims have rights in the criminal justice system that deserve protection. Of note are two statutory rights that relate to interests protected by the 14th Amendment. Crime victims are entitled to 1) protection from harm arising from cooperation with prosecution efforts. TEX. CODE CRIM. PROC. ANN. art. 56.02(a)(1); and 2) the right to have the magistrate take the safety of the victim or his family into consideration in fixing the amount of bail for the accused, TEX. CODE CRIM. PROC. ANN. art. 56.02 (a)(2).

The Texas Legislature also recognized the rights of victims in the Penal Code's statement of its objective. It provides in pertinent part:

> The general purposes of this code are to establish a system of prohibitions, penalties and correctional measures to deal with conduct that unjustifiably and inexcusably causes or threatens harm to *those individual* or public interests for which state protection is appropriate. TEX. PENAL CODE section 1.02. (emphasis added)

Taken together, these statutory rights recognize that a victim of a criminal offense has life, liberty and property interests that are protected by the State of Texas, law enforcement agencies, judges and prosecutors.

And, even if the state has no interests to be protected by the Due Process Clauses, the individual victim has life, liberty and property interests that can only be vindicated through a criminal court proceeding that includes fundamental fairness to the prosecuting attorney and to the defendant.

Protection of the interests of crime victims in recent years has become more widely accepted and recognized. See, e.g., FED. R. EVID. 412, designed to respect the privacy rights of the victim of a sexual assault.

In the instant case, the victims' life and liberty interests were adversely affected by the operation of Section 30.003. By operation of section 30.003, there has been no time since Rep. Danburg has been retained that Collier could have been tried. The Legislature has been in nearly continuous session since January of this year. As of the time this jurisdictional statement was filed, it was unclear when the Legislature would adjourn for a sufficient period of time to allow for Collier's trial. During this time, he has been free on bond, living an essentially normal life.

At the same time, his victims have been hiding, changing residence, even fleeing the state for fear of retribution or attack. They have lost the liberty to live where they want and their very lives are in danger.

As the Texas Supreme Court observed in carving a due process exception to the legislative continuance statute at issue here, in some instances delaying the resolution of a case—civil or criminal—can cause irreparable harm to a party forced to bear the burden of the delay. *Waites v. Sondock,* 561 S.W.2d 772, 774-75 and n. 3 (Tex. 1977).

Like Mary Elizabeth Waites, who would never be able to provide her child with the food, clothing and shelter it would have missed because of child support payments delayed because of a legislative continuance, the complainants in the instant case will never be relieved of the fear and deprivation of rights caused by the legislative continuance here.

Additionally, this is not a situation in which the defendant is a stranger to the victims. He is the husband of one victim and the stepfather of the other. Their fear is more justifiable than if their attacker had been a stranger.

This Court in the recent case of *United States v. Salerno*, ____U.S.____, 107 S. Ct. 2095 (1987) recognized the strong governmental interest in community safety, an interest that was so substantial that it outweighed a criminal defendant's right to release on bail before trial. It also recognized society's interest in preventing harm to crime victims by incarcerating some criminal defendants prior to trial. *Id.* at 2102-03.

Similarly, the government, society at large, the individual victim and the defendant have a strong interest in the speedy and just resolution of criminal charges. This interest will be thwarted if one party—the defendant —is authorized to postpone his trial for an indefinite time by the simple expedient of hiring a member of the Legislature as an attorney.

The Application of Equal Protection Requirements

The Court of Criminal Appeals has drawn a category and judicially determined that two groups of litigants will be treated differently.

The first type of litigant is the public prosecutor and the victims and society he represents. They are deprived of all due process rights and are specifically excluded from the Due Process exception to section 30.003 that was created by the Texas Supreme Court. The other type of litigant is all other litigants in all other types of cases, criminal or civil. They are allowed to show that they would be irrevocably harmed by the use of the legislative continuance.

Appellant submits that this distinction cannot stand any test commonly used in assessing denial of equal protection under either the 14th Amendment or the Equal Protection Component of the Fifth Amendment.

Appellant would first note that the category is not a legislative creation. It was created by the interaction of the two courts of last resort in Texas, the Supreme Court and the Court of Criminal Appeals.

By depriving the prosecutor of the right to overcome, in some limited circumstances, the legislative continuance, the prosecutor, society in general and the victims in the instant case were deprived of fundamental rights. They were deprived of the right to a speedy, fair and certain adjudication of a criminal offense. Normally, this would be insufficient to meet the irreparable injury requirement set by the Supreme Court in *Waites v. Sondock*, 561 S.W.2d 772 (Tex. 1977). But, because of special circumstances in this case, notably the close relationship between the defendant and his victims and the justifiable fear found by the District Court, the irreparable injury requirement is met.

Additionally, the victims in the instant case are personally deprived of their Equal Protection rights as

guaranteed by the 14th Amendment. If this were a divorce and the victims were seeking protective orders preventing the defendant from contacting them, associating with them or in any way threatening them, the orders would issue even though a legislative continuance had been sought by Collier. Here, the victims are helpless to do anything but hide until the 30th day after the Legislature adjourns while Collier is free to walk the streets.

In addition, there is no rational basis to treat the public prosecutor and the society and victims he represents differently from all other litigants. Hence, the judicially-created public prosecutor exception to *Waites* does not meet the rational basis test and should be struck down.

CONCLUSION

The promotion of safety of persons and property is unquestionably at the core of the state's police power. *Kelley v. Johnson,* 425 U.S. 238 (1976). An integral part of promoting the safety of the individual citizen is the ability of society to get a fair adjudication in criminal cases.

Without a recognition that the public prosecutor is entitled as a matter of federal constitutional law to procedural due process, the criminal justice system could break down. Without such a guarantee, the public prosecutor and the society and victims he represents can be deprived, either by statute or by action of the courts, of the basic rights that are part of a fair trial, ranging from notice to the right to call witnesses and the right to cross examine.

The people of Texas have delegated to their public prosecutor the right and duty to enforce the rights of society and individual victims through the criminal justice system. In order to carry out this responsibility, the prosecuting attorney in all cases is entitled to fundamental fairness, to be treated like any other litigant in any case absent a specific constitutional provision designed to guarantee specific rights to a criminal defendant. This right to due process has been recognized both by this Court and Texas courts, although the term "due process" is not used by the courts in their opinions.

The prosecuting attorney serves in a multiple role under both the Texas and federal systems. The prosecuting attorney has a duty to represent society as a whole and the interests of the individual victim. Without a degree of fundamental fairness to the prosecuting attorney, he cannot properly represent those interests. The only way to ensure that fundamental fairness is to recognize that the prosecuting attorney, like any other litigant in any court, has a constitutionally-protected right of due process.

That is not to say that a public prosecutor is entitled to all of the rights and privileges enjoyed by all litigants. The Constitution by its very terms grants special protections to defendants in criminal cases. Congress and the state legislatures can place further limits on the prosecutors. But, those must be substantive and rationally aimed at furthering the protected rights of defendants.

Absent a specific statutory or constitutional limitation, prosecutors are entitled to the same due process rights due any other litigant. Otherwise, society's interest in enforcing its criminal laws, in protecting society from criminal activity and in redressing the legitimate griev-

ances of the victims of crime will be protected only by the unrestrained and unregulated discretion of adjudicatory authorities.

The only way to protect those crucial societal interests is to recognize that the prosecuting attorney, as a representative of society, as a litigant himself, as the attorney for the state and the representative of the victims, has a constitutionally-protected right to fair procedural rules that treat him like all other litigants.

Appellant does not contend that the federal government or the individual states cannot adopt seemingly discriminatory procedural rules or substantive law that are designed to protect a constitutionally-protected interest of a criminal defendant. For example, Texas has adopted TEX. CODE CRIM. PROC. ANN. arts. 38.22 and 38.23 that are designed to give special protection to the rights guaranteed defendants by the Fourth, Fifth and Sixth Amendments as well as Article I, sections 9 and 10 of the Texas Constitution. Article 38.22 makes the recorded statement of the defendant the normal way confessions are admitted into evidence and Article 38.23 is a statutory exclusionary rule. Both are based on policy judgments made by the Legislature to give special protections to defendants in criminal cases. And, both are legitimate acts of the Legislature to preserve our state's traditional values.

Section 30.003, the statute at issue in the instant case, however, is another matter. It is simply a procedural rule for continuances that on its face is designed to treat all litigants identically. By excluding the prosecution and the interests of the victim from the judicially-created due process exception, the prosecution and the victim are

being deprived of a federally-protected right to be treated like all other litigants. It also creates an impermissible category of defendants based on wealth: those entitled to an automatic postponement of their criminal trials because they can afford to hire legislators as co-counsel and those who cannot afford to hire attorney-legislators.

In the instant case, the victims are being deprived of substantial rights—the right to safety, freedom from fear, the right to their day in court, the right to live where they wish—as well as the knowledge that the person accused of shooting them has been fairly tried and, if convicted, punished for his crime. This deprivation amounts to irreparable harm, harm that becomes more severe day-by-day.

The prosecuting attorney and the District Court stand ready to provide a fair adjudication of the charges against Collier. Collier's lead counsel, David Bires, presumably is ready, willing and able to try the case.

Judge Poe is not asking for a sweeping change in constitutional law. All he seeks is a ruling from this Court that public prosecutors and the citizens they represent have the federally-protected right to a fair trial under the procedural rules that apply to all other litigants in all other cases, civil and criminal.

PRAYER

Judge Poe prays that this Court note probable jurisdiction and order full briefs and oral argument on this cause, and, remand this cause to the Court of Criminal Appeals of Texas with instructions to reconsider its order after considering whether the due process rights of the State, society and the victims were violated, OR IN THE

ALTERNATIVE, that this Court treat this jurisdictional statement as a petition for certiorari to the Court of Criminal Appeals of Texas and that it grant his petition, order full briefs and oral arguments and remand this cause to the Court of Criminal Appeals with instructions to reconsider its order after considering whether the right of due process of the State, society and the victims were violated.

Respectfully submitted,

STANLEY G. SCHNEIDER
5300 Memorial, Suite 1000
Houston, Texas 77007
(713) 864-0362

Attorney for Appellant

T. DONALD MORAN
5430 Randon Road
Houston, Texas 77091
(713) 680-8462

Of Counsel

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above document was served on the following:

1) Robert Jack Collier, by mailing a copy to his attorney of record, David Bires, at 2510 Montrose Blvd., Houston, Texas 77006.

2) The Hon. Debra Danburg, by mailing a copy to her at the House of Representatives, Capitol Building, Austin, Texas 78711.

3) The State of Texas, by mailing a copy to the Hon. Jim Mattox, Attorney General of Texas, Supreme Court Building, Austin, Texas 78711.

4) The State of Texas, by mailing a copy to the Hon. John B. Holmes, Jr., District Attorney of Harris County, 201 Fannin, Houston, Texas 77002.

STANLEY G. SCHNEIDER

APPENDIX A

NO. 69,739

ROBERT JACK COLLIER,
Relator

v.

HONORABLE TED POE, JUDGE,
228TH DISTRICT COURT
HARRIS COUNTY,
Respondent

Application for Writ of Mandamus
from HARRIS County

O P I N I O N

This is an original mandamus action brought by relator Collier seeking the issuance by this Court of a writ of mandamus to compel the respondent to vacate certain orders entered on January 2, 1987, and to grant relator's motions for legislative continuances in Cause Nos. 459,914 and 459,915 in the 228th District Court. The motions for continuance were filed by relator's counsel, David Bires, and co-counsel, the Honorable Debra Danburg, State Representative, under the provisions of V.T.C.A., Civil Practice and Remedies Code, § 30.003 (formerly 2168a, V.A.C.S.).

It appears that relator Collier had been separately indicted on October 10, 1986 in each of said cause numbers for the offenses of attempted murder and aggravated assault. Attorney Bires was the original and still current counsel for the relator Collier. On December 1,

1986, the cases were set for trial on January 5, 1987. On December 23, 1986 motions for legislative continuances were filed by Bires and Danburg. The motions for continuance were supported by affidavits of State Representative Danburg in compliance with said § 30.003. And it appears uncontroverted that Danburg was retained as an attorney for the relator more than ten (10) days in advance of the January 5, 1987 trial settings.

The motions for continuance were not controverted by any written motion or motions of the State setting forth any specific factual allegations, that if true, would demonstrate irreparable harm or that substantial existing rights of the State would be defeated or abridged by any delay in the proceedings caused by the granting of the motions for continuance.

On January 2, 1987, the respondent, Judge Poe, conducted an evidentiary hearing on the motions for continuance. At the conclusion of which the motions were overruled and Judge Poe also entered an order prohibiting Danburg from being an attorney of record in said cause numbers.

After overruling the motions the court stated (1) that legislative continuances, "in this particular case" would violate Article I, § 13, Texas Constitution providing that all courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law, (2) that the statute providing for legislative continuances was a "self serving law passed by the legislators for their own self preservation," and (3) the said motions for continuance interfere "with the orderly administration of justice."

Thereafter relator filed his motion for leave to file his application for writ of mandamus in this Court. We stayed the proceedings in the said trial court numbers and ordered a response from the relator. Subsequently on January 22, 1987, we granted leave to file and ordered the application for writ of mandamus to be filed and submitted. Texas Rules of Appellate Procedure, Rule 211. Oral arguments were later heard.

Article V, § 5, Texas Constitution, as amended November 4, 1980 (effective Sept. 1, 1981) provided that subject to such regulations as may be prescribed by law the Court of Criminal Appeals shall have the power to issue "in criminal law matters the writs of mandamus. . . ." See State ex rel. Millsap v. Lozano, 692 S.W.2d 470 (Tex. Cr. App. 1985). See also Article 4.04, V.A.C.C.P. The instant proceedings involves the trial of criminal cases and the denial of motions for legislative continuances. This Court has jurisdiction of this criminal law matter.

The matter of a mandatory continuance based on the attendance at legislative sessions of an attorney in the case, civil or criminal, has long caused tension between the judicial and legislative branches of state government. The controversy has often swirled "in the press, court and legislative hall," DeVries v. Taylor, 505 S.W.2d 780 (Tex. 1973), and the subject matter has frequently become a ballot box issue in legislative races.

It has been said that it is the inherent right of courts to determine the order of trials and to direct the method of their management in the administration of justice. 17 Am. Jur. 2d, Continuance, § 2, p. 118. And as a general rule the determination of whether to grant a

continuance lies with the sound discretion of the court. Tex. Jur. 3d, Vol. 23, Criminal Law, § 2525, pp. 124-125.

At common law attendance upon the sessions of a legislative body was not a cause for continuance which a court was bound to recognize. Johnson v. Theodoron, 155 N.E. 481, 483 (Ill. 1927). Thus absence of counsel in attendance in the Legislature is not in the absence of statute, a sufficient cause for continuance. 17 C.J.S., Continuances, § 37, p. 415.

And for this reason, commencing 58 years ago, the Texas Legislature has been enacting statutes pertaining to the granting of legislative continuances by the courts, once discretionary in nature and other times mandatory. The broad public policy behind such legislation in Texas and other states is or should be easily understood. Such legislation usually serves a dual purpose of encouraging good men and women to sacrifice their time in the interest of good government and of protecting a party to a law suit whose attorney may be serving in the Legislature. See Bridges v. State Bd. of Registration for Healing Arts, 419 S.W.2d 278 (Mo. 1967). One of the best descriptions of the public policy supporting such legislation is found in Bottoms v. Superior Court, 82 Cal. App. 764, 256 P. 422, 424 (1927), which was quoted at length by the Texas Supreme Court in Government Services Ins. Underwriters v. Jones, 368 S.W.2d 560, 565 (Tex. 1963). It need not be repeated here.

Mandatory legislative continuances are frequently said to deprive the judiciary of its power to control the order of trials and its proper authority to administered justice, to particularly handcuff the trial court in its discretion,

and to result in abuses by the lawyer/legislator to whom the right or privilege is granted. It is often charged that legislative continuances are utilized for the purpose of delay only, and that lawyer/legislators are employed for that purpose only.

Others argued that leaving the matter to the discretion of the court to determine whether the legislative continuance should be granted to insure a fair and proper trial results too often in arbitrariness of the court in overruling such a motion without any understanding of the public policy behind such legislation. The claims of "abuses" versus claims of "arbitrary actions" have invoked the constitutional issues of separation of powers doctrine, due process of law, due course of the law of the land, etc.

It is instructive that the history of the current legislative continuance statute (said § 30.003) and its forerunners be briefly examined.

Texas' first attorney/legislator continuance statute was enacted in 1929 (Acts 1929, 41st Leg., p. 17, ch. 7 [S.B. 356]),[1] which was codified as Article 2168a,

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1. *"Be it enacted by the Legislature of the State of Texas*:
"SECTION 1. In all suits, either civil or criminal, or in matters or probate, pending in any court of this State at any time the Legislature is in session, it shall be sufficient ground for a continuance of such cause if it shall appear to the court, by affidavit, that any party applying for such continuance, or any attorney for any party to such cause, is a member of either branch of the Legislature, and is in actual attendance on a session of the same, and that the presence of party or attorney is necessary to a fair and proper trail (sic) of the cause. Where a party to any cause is a member of the Legislature his affidavit need not be corroborated but where a continuance is sought by reason of the fact that an attorney for any party is a member of the Legislature such affidavit shall be made by both the party

V.A.C.S. The statute was a discretionary one and required continuance for the attorney/legislator when it appeared to the trial court that the presence of the legislator was necessary to a fair and proper trial. Nevertheless a broad public policy was declared. It was recognized that members of the Legislature must give constant and uninterrupted attention to their duties lest that bad legislation be enacted or good laws repealed, etc., and that when legislators are also lawyers they should be relieved by law from having to concern themselves with matters pertaining to their practice of law independent of their legislative duties. See Tex. Jur. 3d, Vol 23, Crim. Law, § 2525, p. 124.

While the 1929 statute was in effect the Court of Criminal Appeals decided three cases thereunder. They all involved direct appeals from criminal convictions where the legislative continuance motions had been overruled by the trial court in its discretion. In Davis

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and his said attorney. On the filing of such affidavit the court shall continue the cause until ten days after the adjournment of the Legislature and such affidavit shall be proof of the necessity for such continuance, and such continuance shall be deemed one of right and shall not be charged against the Defendant upon any subsequent application for continuance.

"SEC. 2. The fact that *a large number of the members of* both branches of the *Legislature are* engaged *in the practice of law,* and have suits pending in the courts of the State, *and* the fact that the *trials* of such *causes* necessarily requires such *members to absent themselves* from the meetings of the Senate and House *and thereby deprive the State of the service of such members and injure and hamper the Legislature in the dispatch of business,* creates an emergency and an imperative public necessity demanding the suspension of the constitutional rule, and requiring bills to be read on three several days in each House, and such rule is hereby suspended, and this act shall take effect and be in force from and after its passage, and it is so enacted." (Emphasis supplied.)

v. State, 49 S.W.2d 805 (Tex. Cr. App. 1932), the defendant had been represented by an able firm of attorneys at other trials of the case when the Legislature was not in session. The lawyer/legislator involved was not then of counsel. The legislative continuance motion was presented while the original lawyers still represented Davis and was denied. On appeal this Court held that the granting of the continuance motion in absence of the new attorney was addressed to the sound discretion of the trial court and would not be reviewed in absence of a showing of probable injury to the defendant. The court stated:

> "Discretion in regard to such a ruling on the part of the trial court is believed to be an attribute inherent in the courts, and attempt to take it away by legislative enactment would seem a transgression by one department of our government upon the proper functions of a different and co-ordinate department thereof."

In Burton v. State, 86 S.W.2d 768 (Tex. Cr. App. 1935), the motion was based on the fact that one of Burton's attorneys was a legislator, and a Called Session had adjourned less than 10 days prior to the time the case was called for trial. This Court on appeal held that the motion for legislative continuance was addressed to the sound discretion of the trial Court and no abuse of discretion appeared where the accused had other counsel.

In Burkhart v. State, 26 S.W.2d 238 (Tex. Cr. App. 1930), the motion based on one of Burkhart's lawyer's attendance upon a legislative session was held properly overruled by the trial judge because the affidavit in sup-

port of the motion did not aver that the lawyer/legislator's presence at the trial was "necessary to a fair and proper trial."

On the civil side it was held in Watts v. City of Donna, 43 S.W.2d 268 (Tex. Civ. App.—San Antonio 1931), that it was error for the trial court to have overruled the appellant's motion for continuance when the lead counsel was absent due to illness and the other counsel was in attendance on the Legislature as a member although the judgment entered after trial without participation by the appellant was null and void on another ground.

In Antner, et al. v. State, 122 S.W.2d 360 (Tex. Civ. App.—Ft. Worth 1938), involving an action to enjoin certain parties from operating an open saloon in violation of the law, it was held that denial of the legislative continuance motion was not erroneous since no injury to the defendants was shown, and where the appeal had become moot and was dismissed.

In 1939 the Legislature gave to the Supreme Court of Texas full rule-making power in civil judicial proceedings (Acts 1939, 46th Leg., p. 201, ch. 25, codified as Art. 1731a, V.A.C.S.). Pursuant to that authority the Supreme Court promulgated the Texas Rules of Civil Procedure in October, 1940 and submitted copies of the same to the members of the incoming Legislature by December 1, 1940 with the effective date of such new rules being September 1, 1941.

Rule 254 of the Texas Rules of Civil Procedure was the same as Article 2168a, supra, as enacted in 1929

with minor textual changes.[2] The rule, as well as the statute, left the matter with the sound discretion of the court.

During the 1941 legislative session the Legislature acted to authorize the Supreme Court to amend the already promulgated Rules of Civil Procedure prior to April 1, 1941. (Acts 1941, 47th Leg., p. 66, ch. 53, effective March 1, 1941.)

However, during the same legislative session Article 2168a, supra, was amended to make it a mandatory statute rather than a discretionary one. (Acts 1941, 47th Leg., p. 69, ch. 56, § 1).[3] The Supreme Court

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2. "Rule 254. Attendance on Legislature.—In all civil actions pending in any court of this State at any time the legislature is in session, it shall be sufficient ground for a continuance of such cause if it shall appear to the court, by affidavit, that any party applying for such continuance, or any attorney for any party to such cause, is a member of either branch of the legislature, and is in actual attendance on a session of the same, and that the presence of party or attorney is necessary to a fair and proper trial of the cause. Where a party to any cause is a member of the legislature his affidavit need not be corroborated but where a continuance is sought by reason of the fact that an attorney for any party is a member of the legislature such affidavit shall be made by both the party and his said attorney. On the filing of such affidavit the court itself continue the cause until ten days after the adjournment of the legislature and such affidavit shall be proof of the necessity for such continuance, and such continuance shall be deemed one of right and shall not be charged against the movant upon any subsequent application for continuance."

3. *"Be it enacted by the Legislature of the State of Texas*:
"Section 1. That Section 1 of Senate Bill No. 356 of the Regular Session of the 41st Legislature is hereby amended so as to read as follows:
" 'Section 1. In all suits, either civil or criminal, or in matters of probate, pending in any court of this State at any time within ten (10) days of a date when the Legislature is to be in session, or at any time the Legislature is in session, *it shall be mandatory that the court continue such cause* if it shall appear

was later to say that the amendment was in reaction to the decisions in *Davis, Burton* and *Burkhart,* supra, by the Court of Criminal Appeals. See Mora v. Ferguson, 199 S.W.2d 759, 762 (Tex. Cr. App. 1947). No mention in the bill was made of said Rule 254 which was to become effective later that year and applicable only to civil proceedings.

And still later in the year one court refused to apply the 1941 version of Article 2168a retroactively in a civil case. Zachary v. Overton, et al., 157 S.W.2d 405 (Tex.

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to the court, by affidavit, that any party applying for such continuance, or any attorney for any party to such cause, is a member of either branch of the Legislature, and will be or is in actual attendance on a session of the same. Where a party to any cause is a member of the Legislature, his affidavit need not be corroborated. On the filing of such affidavit, the court shall continue the cause until ten (10) days after the adjournment of the Legislature and such continuance shall be deemed one of right and shall not be charged against the party receiving such continuance upon any subsequent application for continuance. *It is hereby declared to be the intention of the Legislature that the provisions of this section shall be deemed mandatory and not discretionary.'*

"Sec. 2. The fact that a large number of the members of both branches of the Legislature are engaged in the practice of law and have suits pending in the courts of the State, and the fact that the trials of such causes would necessarily require such members to absent themselves from the meetings of the Senate and House, and thereby deprive the State of the service of such members and injure and hamper the Legislature in the dispatch of business, and the fact that the courts have construed the present law providing for continuance to be discretionary and not mandatory, creates an emergency and an imperative public necessity demanding the suspension of the Constitutional Rule requiring bills to be read on three several days in each House, and also the suspension of the Constitutional Rule which provides that laws shall not become effective until the expiration of ninety days after the adjournment of the session; and such Rules are hereby suspended, and this Act shall take effect and be in force from and after its passage, and it is so enacted." (Emphasis supplied.)

Civ. App.—Galveston 1941). The Court found the employment of the legislator/lawyer was for the sole purpose of delay and no error resulted in overruling the continuance motion. No mention of the 1929 version of Article 2168a or Rule 254 was made.

In 1947 the Supreme Court of Texas interpreted the 1941 version of Article 2168a in an original mandamus and prohibition action by Mora and his attorney, Senator Rogers Kelley against District Judge Bryce Ferguson, respondent. See Mora v. Ferguson, supra. This action grew out of a pending rape case at a time when the Supreme Court had full mandamus jurisdiction even in criminal cases and the Court of Criminal Appeals did not.[4]

The *Mora* Court held that the statute made it mandatory on the trial court to grant a continuance where the party or his attorney is a member of the Legislature and certain conditions are shown by affidavit. It made clear that under such circumstances the matter of continuance did not rest solely within the discretion of the trial court. The Court observed that Senator Kelley had been the sole counsel for Mora since his arrest. The Court declared the statute was not unconstitutional on the ground that it undertook to add to the privileges and immunities given members of the Legislature by express constitutional provision. Other constitutional grounds were not considered nor was said Rule 254 mentioned as it was applicable, if at all, only to civil cases.

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4. See Farris v. Tipps, 462 S.W.2d 176 (Tex. Cr. App. 1971); Pope v. Ferguson, 445 S.W.2d 950 (Tex. 1969), cert. den., 397 U.S. 997 (1970). Since the amendment of Article V § 5, Tex. Constitution, in 1977 and 1980, see Thomas v. Stevenson, 561 S.W.2d 845 (Tex. Cr. App. 1978).

In 1949 the Legislature again amended Article 2168a, supra, making it applicable to "all suits, either civil or criminal or in matters of probate" and reiterating the mandatory language of the 1941 version. The only change was the provision for a legislative continuance if within 30 days before and after a session of the Legislature rather than 10 days in the earlier version. The emergency clause noted that Rule 254 of the Rules of Civil Procedure had in civil actions superseded the 1929 and 1941 enactments creating "an emergency." (Acts 1949, 51st Leg., p. 1111, ch. 569.)[5]

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5. *"Be it enacted by the Legislature of the State of Texas*:

"Section 1. Senate Bill No. 356, Acts of the Forty-first Legislature, 1929, page 17, Chapter 7, as amended by Senate Bill No. 136, Acts of the Forty-seventh Legislature, Regular Session, 1941, Chapter 56, page 69, is hereby re-enacted so as to hereafter read as follows:

" 'In all suits, either civil or criminal, or in matters of probate, pending in any court of this State at any time within thirty (30) days of a date when the Legislature is to be in Session, or at any time the Legislature is in Session, it shall be mandatory that the court continue such cause if it shall appear to the court, by affidavit, that any party applying for such continuance, or any attorney for any party to such cause, is a Member of either branch of the Legislature, and will be or is in actual attendance on a Session of the same. Where a party to any cause is a Member of the Legislature, his affidavit need not be corroborated. On the filing of such affidavit, the court shall continue the cause until thirty (30) days after the adjournment of the Legislature and such affidavit shall be proof of the necessity of such continuance, and such continuance shall be deemed one of right and shall not be charged against the party receiving such continuance upon any subsequent application for continuance. It is hereby declared to be the intention of the Legislature that the provisions of this Section shall be deemed mandatory and not discretionary.'

"Sec. 2. The fact that Rule No. 254 of the Rules of Civil Procedure, as authorized by Senate Bill No. 92, Acts of the Forty-seventh Legislature, Regular Session, 1941, Chapter 53, page 66, has superseded, in so far as civil actions are concerned, the provisions of Senate Bill No. 356, Acts of the Forty-first

In 1954 the Court of Criminal Appeals decided King v. State, 273 S.W.2d 72 (Tex. Cr. App. 1954), a murder conviction on direct appeal which involved the 1949 version of Article 2168a, supra. This Court observed that the 1941 version of the statute had been interpreted by the Supreme Court as being mandatory in *Mora* and only had been slightly changed. Noting that when a statute is of a nature that it might be construed in one court as well as another respect is to be given to the decision of the court giving the first interpretation, Redman v. State, 149 S.W. 670 (Tex. Cr. App. 1911), the Court held the 1949 statute mandatory. The Court then added:

> "The evidence heard by the trial court on the application for a continuance in this case fully supports his (sic) finding that the *application was a clear abuse of the privilege by one entitled to claim it under said statute;* however, we are constrained to hold that, *under the terms of the statute* and the application setting forth the necessary requirements, *the trial court was not authorized to overrule the motion* because of such finding, and the continuance should have been granted."
> (Emphasis supplied.)

It has been said that "no recorded decision in any other state has gone this far" in legislative continuance

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Legislature, 1929, page 17, Chapter 7, as amended by Senate bill No. 136, Acts of the Forty-seventh Legislature, Regular Session, 1941, Chapter 56, page 69, and due to the crowded condition of the calendar in both Houses of the Legislature, create an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended, and said Rule is hereby suspended, and that this Act shall be in force and effect from and after its passage, and it is so enacted."

cases and that *King* was an "extreme" decision. Philip F. Patman, Note, Texas Law Review, Vol. 42, pp. 391, 396, 398.

In 1955 the Texas Supreme Court, while acknowledging the mandatory nature of Article 2168a, supra, decided that a suit to perpetuate testimony did not fall within the ambit of the statute. Ramsey v. Gardner, 279 S.W. 2d 584 (Tex. Cr. App. 1955). Likewise in Shumard v. Scanlan, 346 S.W.2d 595 (Tex. Cr. App. 1961), that Court decided the taking of a deposition was not within the purview of the statute and expressly reserved the question of the constitutionality of the statute on the basis of "invading the powers of the judiciary as has been held by courts in some states in passing upon the validity of similar statutes." 346 S.W.2d at p. 598.

And then along came Government Services Ins. Underwriters v. Jones, 368 S.W.2d 560 (Tex. 1963). Insurance company liquidation proceedings were pending in the district court of Travis County when State Senator (now Justice) Franklin Spears was employed by one or more defendants in October 1962, before the 1963 legislative session. In April 1963, while the Legislature was in session, a legislative continuance motion in compliance with Article 2168a, supra, as amended in 1949, was filed but overruled by District Judge Herman Jones on the basis that the mandatory nature of the statute rendered the same unconstitutional under Article II, § 1 of the Texas Constitution involving the separation of powers doctrine. Relators applied to the Texas Supreme Court for an original writ of mandamus to compel the district judge to order a continuance in accordance with *Mora*.

The Supreme Court conditionally granted the requested writ holding that Article 2168a was a valid limitation by the Legislature on judicial power. The general constitutional rule is expressed in Article II, § 1 of the State Constitution that no person or collection of persons of one of the three branches or departments of state government shall exercise any power properly attached to the other except as expressly permitted by the Constitution. *Government Services Insurance Underwriters Co. v. Jones,* however, constitutes a judicially recognized exception to the general rule. The Supreme Court, speaking through Justice Norvell, found that there are accepted areas of valid legislative concern and control within the judicial sphere.[6] Justice Norvell pointed out there are proceedings in court which are recognized to be essentially legislative rather than judicial in character[7]

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6. Examples given in the 1963 opinion involved legislative setting of terms of district courts, legislative promulgation of rules of evidence, *legislative control of continuances in criminal cases* and supreme legislative authority, then delegated to the Supreme Court, to make rules of civil procedure. More current examples readily come to mind (Acts 1985, 69th Leg., p. 5136, ch. 685) authorizing the Court of Criminal Appeals to make Posttrial, Appellate and Review Procedure in Criminal Cases and to make certain rules of evidence in criminal cases.

7. "However, the problem of determining that which is judicial and that which is legislative is often difficult of statement under varying factual circumstances. Classification may depend upon the particular nomenclature and definitions employed in the field of learning with which one is concerned. * * *

"In determining whether or not the exercise of a power by one branch of government is an unauthorized invasion of the realm or jurisdiction of another branch, we must consider the relationship of the various governmental departments as set forth and defined in the Texas Constitution for that which is permitted by the Constitution cannot be unconstitutional. The power and authority of a state legislature is plenary and its extent is limited only by the express or implied restrictions thereon contained in or necessarily arising from the Constitution itself. . . ." 368 S.W.2d at pp. 562-563.

and reasoned that the general rule does not mean there is not or cannot be interrelation between the branches of government, the three branches being viewed as interdependent rather than completely independent.[8] The Court thus held the statute did not violate the separation of powers doctrine. In its opinion the Supreme Court expressly reserved due process questions concerning the statute involving the Fourteenth Amendment, United States Constitution, and Article I, §§ 13 and 19 of the State Constitution.[9] See Note, Texas Law Review 42, p. 391, supra.

In Hatten v. City of Houston, 373 S.W.2d 525 (Tex. Civ. App.—Houston 1963), err. ref'd, n.r.e., the court acknowledged that Article 2168a, as amended in 1949, was mandatory.

Citing *Mora* and *King* the Court of Criminal Appeals also recognized the mandatory nature of the 1949

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8. ". . . We speak of the American system of separation of powers and checks and balances. These are seemingly contradictory terms and it should be recognized that all tthree branches of government are to some extent interdependent. A mandatory continuance by legislative enactment will undoubtedly interfere somewhat with the operations of the judicial department of government. On the other hand when a court requires that the legislator-attorney be in attendance upon it while the Legislature is in session some interference with the legislative process necessarily takes place. *The statutory right or privilege of the legislator is undoubtedly subject to abuse, but so is the discretion of the judge.* It is primarily the responsibility of the respective branches of government to curb abuses within their particular spheres. While a continuing failure to meet this responsibility may indicate a need for constitutional change, the circumstance that a power may be abused is not a valid basis for arguing that the power is non-existent." 368 S.W.2d at pp. 564-565.

9. The Court did not consider that these questions were effectively raised despite the Attorney General's (representing the respondent) attempt to expand his original position in his motion for rehearing.

version of Article 2168a, supra, and ordered reversals in Ex parte Browder, 373 S.W.2d 256 (Tex. Cr. App. 1963) and Cuellar v. State, 521 S.W.2d 277 (Tex. Cr. App. 1975).[10] Cf. Bradley v. State, 450 S.W.2d 847 (Tex. Cr. App. 1969) (where the overruling of the motion was not error when the Legislature was not in session and other time provisions of the statute were not applicable and the requisite affidavit was not filed).

In 1973 the statute was once again amended. It maintained its mandatory nature, and expressly repealed said Rule 254, and all laws in conflict therewith. Recognizing that the statute had been the subject of abuse by legislator/lawyers, the amendment provided a statutory exception where the attorney had not been "employed within 10 days of the date such suit is set for trial" and left the matter of continuance within the court's discretion in that situation. (Acts 1973, 63rd Leg., p. 1130, ch. 428.[11]

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10. *Cuellar* involved convictions for rape where the trials occurred in 1972.

11. "*Be it enacted by the Legislature of the State of Texas*:

"Section 1. Acts 1929, 41st Legislature, Regular Session, page 17, Chapter 7, Section 1, as amended by Acts 1941, 47th Legislature, Regular Session, page 69, Chapter 56, Section 1, as further amended by Acts 1949, 51st Legislature, Regular Session, page 1111, Chapter 569, Section 1, known and codified as Article 2168a, Vernon's Annotated Civil Statutes of the State of Texas, be and the same is hereby amended so as hereafter to read as follows:

" 'Art. 2168a. Attendance on Legislature.

" 'In all suits, either civil or criminal, or in matters of probate, pending in any court of this State, and in all matters ancillary to such suits which require action by or the attendance of an attorney, including appeals but excluding temporary restraining orders, at any time within thirty (30) days of a date when the Legislature is to be in Session, or at any time the Legislature is in Session, or when the Legislature sits as a Constitutional Convention, it shall be mandatory that the court continue such

The statutory exception above described was applied and the denial of the legislative continuance was upheld

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cause if it shall appear to the court, by affidavit, that any party applying for such continuance, or any attorney for any party to such cause, is a Member of either branch of the Legislature, and will be or is in actual attendance on a Session of the same. If the member of the Legislature is an attorney for a party to such cause, his affidavit shall contain a declaration that it is his intention to participate actively in the preparation and/or presentation of the case. Where a party to any cause or an attorney for any party to such cause is a Member of the Legislature, his affidavit need not be corroborated. On the filing of such affidavit, the court shall continue the cause until thirty (30) days after the adjournment of the Legislature and such affidavit shall be proof of the necessity for such continuance, and such continuance shall be deemed one of right and shall not be charged against the party receiving such continuance upon any subsequent application for continuance. It is hereby declared to be the intention of the Legislature that the provisions of this Section shall be deemed mandatory and not discretionary.

"'Notwithstanding the foregoing, the right to such continuance, where such continuance is based upon an attorney in such cause being a member of the Legislature, shall be discretionary with the Court in the following situations and under the following circumstances, and none other, to wit:

"'(1) Where such attorney was employed within 10 days of the date such suit is set for trial.'

"Sec. 2. Rule 254, Texas Rules of Civil Procedure, is hereby repealed to the extent of any inconsistency with the provisions of this Act, and said Rule is hereby conformed to the provisions hereof.

"Sec. 3. All laws and rules, or parts of laws or parts of rules, in conflict herewith are hereby repealed to the extent of such conflict; and in the event of conflict between this Act and any other statute or rule, the provisions of this Act shall prevail.

"Sec. 4. The fact that mandatory continuance of suits for Members of the Legislature has been the subject of some abuse, and the fact that on occasion it has appeared that such mandatory continuances have been used solely for the purpose of delay, and the crowded condition of the calendars in both Houses of the Legislature, create an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House, and the Constitutional Rule that bills shall not be effective until 90 days after the adjournment of the Legislature, be and such Rules are hereby suspended, and this Act shall be in full force and effect from and after its passage, and it is so enacted."

in DeVries v. Taylor, 505 S.W.2d 780 (Tex. 1973). And in Schwartz v. Jefferson, 520 S.W.2d 881 (Tex. 1975), the Court observed, in granting a conditional mandamus, that the 1973 mandatory amendment was still alive and well.[12] In Glover v. State, 532 S.W.2d 346 (Tex. Cr. App. 1976), a misdemeanor conviction was reversed by this Court for the failure of the trial judge to comply with Article 2168a, and in Ex parte Smith, 555 S.W.2d 756 (Tex. Cr. App. 1976), it was observed that the trial judge had no discretion when the requirements of the statute had been met. See and cf. Ex parte King, 613 S.W.2d 503, 504 (Tex. Cr. App. 1981).

Despite the mandatory nature of the 1973 version of Article 2168a, the Supreme Court of Texas fashioned a due process exception thereto in Waites v. Sondock, 561 S.W.2d 772 (Tex. 1977), where the trial court had granted the legislative continuance motion. This cause involved an original mandamus action regarding the granting of a legislative continuance in a child support case. In *Waites* the Court held that it was a violation of due process to require mandatory legislative continuances when the party opposing such continuance or a person in their charge face irreparable harm from delay in enforcing substantial existing rights. The decision was based upon the due process clause of the Fourteenth Amendnment of the United States Constitution and upon Article I, §§ 13 (Open Courts)[13] and 19 (due course of

12. *Schwartz v. Jefferson* held that a civil suit is no longer "pending" within the meaning of Article 2168a after the suit has proceeded to final judgment from which no appeal was perfected.

13. In Sax v. Votteler, 648 S.W.2d 661, 664 (Tex. 1983), it was pointed out that the State Constitution contained two separate due

the law of the land) of the Texas Constitution. The question decided in *Waites* was the very question expressly reserved in *Government Services Ins. Underwriters v. Jones,* supra.

The *Waites* Court, speaking through Justice Yarbrough, stated:

> "We agree with the conclusions of these courts[14] insofar as their decisions deal with the constitutionality of mandatory legislative continuances *when the non-moving party faces irreparable harm.* At the same time we reiterate the limited nature of our holding: *a legislative continuance is mandatory except in those cases in which the party opposing* the continuance *alleges that a substantial existing right will be defeated or abridged by delay.* In cases of this type the trial court has a duty to conduct a hearing on the allegations. If the allegations are shown to be meritorious the court should deny the continuance."

Thus the Court held the statute (2168a) unconstitutional as applied to Mrs. Waites. See Sax v. Votteler, 648 S.W.2d 661, 665 (Tex. 1983). *Waites* was later applied in Condovest Corp. v. John Street Builders, 662 S.W.2d 138 (Tex. App.—Austin 1983).

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process provisions. Article I, §§ 13 and 19. The Court, speaking through Justice Kilgarlin, wrote:

> "While it is true that this provision [Art. I, § 13] is sometimes referred to as the 'Open Courts Provision' it is quite plainly, a due process guarantee. See Hanks v. City of Port Arthur, 121 Tex. 202, 48 S.W.2d 944, 945 (1932); 1 Braden, The Constitution of Texas, An Annotated and Comparative Analysis 50 (1977)."

14. See ABC Business Forms, Inc. v. Spaet, 201 So.2d 890 (Fla. 1967); Thurmond v. Superior Court, 66 Cal.2d 836, 59 Cal.Rptr. 273, 427 P.2d 985 (1967). Neither of these cases was decided, however, on the basis of due process of law.

In Curry v. Ater, 648 S.W.2d 10 (Tex. Cr. App. 1983), this Court once again held that the granting of a legislative continuance motion was mandatory if it conforms with the statutory requirements. Judge Ater denied the legislative continuance motion of State Senator Craig Washington filed in a habeas corpus proceeding in which Curry sought to prevent extradition. Curry sought relief by original mandamus action in this Court. In *Curry* this Court found that Senator Washington was outside the statutory exception [Article 2168a(1)] having been employed more than 10 days before the trial date, and applying the second and due process exception of *Waites* found that the State of Virginia, the demanding state, had not alleged or pointed out what substantial existing right or rights would be defeated or abridged by delay resulting from the granting of a continuance. The application of the due process exception in Curry was without discussion of the applicability of such exception in criminal cases.

In 1985 Article 2168a, V.A.C.S., was once again amended and encompassed within the Civil Practice and Remedies Code (Acts 1985, 69th Leg., ch. 959, § 1, effective Sept. 1, 1985). Section 10 of said enactment provides:

> "Legislative Intent. This Act is enacted pursuant to Article III, Section 43 of the Texas Constitution. This Act is intended as a recodification only, *and no substantive change in the law is intended by this Act.*"[15] (Emphasis supplied.)

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15. Section 1.001 of the Civil Practice and Remedies Code reads: "(a) This code is enacted as a part of the state's continuing statutory revision program, begun by the Texas Legislative Council in 1963 as directed by the legislature in Chapter 448,

Section 30.003 (Legislative Continuance) replaced the former statute. It reads:

> "(a) This section applies to any criminal or civil suit, including matters of probate, and to any matters ancillary to the suit that require action by or the attendance of an attorney, including appeals but excluding temporary restraining orders.
>
> "(b) Except as provided by Subsection (c), at any time within 30 days of a date when the legislature is to be in session, at any time during a legislative session, or when the legislature sits as a constitutional convention, the court on application shall continue a case in which a party applying for the continuance or the attorney for that party is a member of the legislature and will be or is attending a legislative session. The court shall continue the case until 30 days after the date on which the legislature adjourns.
>
> "(c) If the attorney for a party to the case is a member of the legislature who was employed within 10 days before the date on which the suit is set

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Acts of the 58th Legislature, Regular Session, 1963 (Article 5429b-1, Vernon's Texas Civil Statutes).[1] The program contemplates a topic-by-topic revision of the state's general and permanent statute law *without substantive change.*

"(b) Consistent with the objectives of the statutory revision program, the purpose of this code is *to make the law* encompassed by this code *more* accessible and *understandable,* by:

"(1) rearranging the statutes into a more logical order;

"(2) employing a format and numbering system designed to facilitate citation of the law and to accommodate future expansion of the law;

"(3) eliminating repealed, duplicative, unconstitutional, expired, executed, and other ineffective provisions; and

"(4) *restating the law in modern American English to the greatest extent possible.*

"

"1. "Repealed; see, now, V.T.C.A., Government Code, §§ 323.007, 323.008." (Emphasis supplied.)

for trial, the continuance is discretionary with the court.

"(d) The party seeking the continuance must file with the court an affidavit stating the grounds for the continuance. The affidavit is proof of the necessity for a continuance. The affidavit need not be corroborated.

"(e) If the member of the legislature is an attorney for a party, the affidavit must contain a declaration that it is the attorney's intention to participate actively in the preparation or presentation of the case.

"(f) The continuance provided by Subsection (b) is one of right and may not be charged against the party receiving it on any subsequent application for continuance."

While the phrases "it shall be mandatory that the court continue such cause. . . ." and "It is hereby declared to the intention of the Legislature that the provision of this Section shall be deemed mandatory and not discretionary" are missing from the 1985 amendment, a reading of the statute in light of the legislative intent expressed in the said Code convinces this Court that the statute is still a mandatory one. And it is this statute which is applicable to the case before us.

Section 30.003 retained the statutory exception from the earlier statute, but it is undisputed that in the instant case Representative Danburg was employed as counsel in the criminal cases involved within 10 days before the trial setting. See Subsection (c) of § 30.003. This brings us to the due process exception enunciated in *Waites* and recognized by this Court in criminal cases in *Curry*. This new enactment does not apparently eliminate the necessity

of the due process exception, but the question which now presents itself is whether that exception can have application to criminal cases.

Article 3.02, V.A.C.C.P., provides:

> "*A criminal action is prosecuted in the name of the State of Texas* against the accused, and is conducted by some person acting under the authority of the State, in accordance with its laws." (Emphasis supplied.)

Black's Law Dictionary, Fifth Edition (1979), West Publishing Company, p. 1262, defines "State" in one of its meanings as

> "The people of a state, in their collective capacity, considered as the party wronged by a criminal deed; the public; as in the title of a cause, 'The State v. A. B.'"
>
> "The concept that the state has a special interest in the prosecution of criminal cases that requires the presence of a professionally trained advocate arose during the formative period of American law. Earlier in England, it had been assumed that prosecution was a matter for the victim, his family, or friends.[1]
>
> *The idea that criminal law, unlike other branches of the law* such as contracts and property, *is designed to vindicate public rather than private interests is now firmly established. . . .*
>
> "———————
>
> "1. "See M. Schwartz, Cases and Materials on Professional Responsibility and the Administration of Criminal Justice 4-5 (1961)." American Bar Standards for Criminal Justice, Second Edition, Volume 1, Chapter 3, § 2.1, Commentary. (Emphasis supplied.)

Article 2.01, V.A.C.C.P., provides that each district attorney shall represent the State in all criminal cases in the district courts of his district. See also Article 2.02 as to duties of County Attorneys, and Article V, § 21, Tex. Const.

The significance of this is that the State is not entitled to the due process of law usually because of the very wording of the various provisions.

The rights created by the first section of the Fourteenth Amendment are, by its very terms, guaranteed to the individual. The rights established are personal rights. Shelley v. Kraemer, 334 U.S. 1, 68 S. Ct. 836, 846, 92 L.Ed. 1161 (1948).[16]

An agency or political subdivision of the State cannot invoke the protection of the Fourteenth Amendment against the State itself. Alexander Milburn Co. v. Davis Bournonville Co., 270 U.S. 390, 46 S. Ct. 324, 70 L.Ed. 651 (1926); City of Trenton v. New Jersey, 262 U.S. 182, 43 S. Ct. 534, 67 L.Ed. 937 (1923); City of New York v. Richardson, 473 F.2d 923 (2nd Cir. 1973), cert. den., 412 U.S. 956, 93 S. Ct. 3012, 37 L.Ed.2d 1002 (1983); Arkansas State Hospital v. Goslee, 623 S.W.2d 513 (S. Ct. Ark. 1981). Thus political subdivisions of the State may not challenge the validity of a state statute under the Fourteenth Amendment. City of New York v. Richardson, supra. See also Village of Arlington Heights v. Regional Transportation Authority. 653 F.2d 1151 (7th Cir. 1981); South Macomb Disposal Authority

16. Further, the word "person" in the context of the due process clause of the Fifth Amendment cannot by any reasonable mode of interpretation, be expanded to encompass the States of the Union. South Carolina v. Katzenbach, 383 U.S. 301, 86 S. Ct. 803, 816, 15 L.Ed.2d 369 (1966).

v. Township of Washington, et al., 790 F.2d 500 (6th Cir. 1986).

And in Texas it has been said that neither the State nor any agency of the State is entitled to due process of law. McGregor v. Clawson, 506 S.W.2d 922 (Tex. Civ. App. —Waco 1974).[17] See also Hill v. Texas Water Quality Board, 568 S.W.2d 738, 739 (Tex. Civ. App.—Austin 1978), writ ref'd n.r.e., and Boyett v. Calvert, 467 S.W. 2d 205, 210 (Tex. Civ. App.—Austin 1971), writ ref'd n.r.e., appeal dismissed for want of federal question *sub nom* Anderson v. Calvert, 405 U.S. 1035, 92 S. Ct. 1316, 31 L.Ed.2d 577 (1972). In State ex rel. Turner v. McDonald, 676 S.W.2d 371, 373 (Tex. Cr. App. 1984), this Court stated ". . . and Respondent is correct that due process *and due course of law* are guarantees to citizens and not governments or their agents." (Emphasis supplied.)

While the two separate due process provisions of the State Constitution, Article I, §§ 13 and 19, may be worded differently than the Fourteenth Amendment, we cannot conclude that they may be interpreted to provide that the State or any agency thereof is entitled to due process.

Thus the due process exception to the legislative continuance statute fashioned in *Waites* is not applicable to criminal cases. Such "exception" may not be invoked

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17. "An agency created by a State has no privileges, immunities, or rights under the State and Federal Constitutions which it may invoke in opposition to the will of its creator. [Citations omitted.] In other words, a State has no standing to assert that *one of its own legislative enactments* denies it constitutional due process or deprives it of equal protection of the laws. The same rule applies to the State's agencies." 506 S.W.2d at p. 929.

by the prosecutor, either county or district attorney, to protect interests of the State that are not covered by the Fourteenth Amendment, United States Constitution, or Article I, §§ 13 and 19 of the Texas Constitution. To the extent that Curry v. Ater, supra, is in conflict with this holding, it is overruled.[18] With regard to the instant proceeding, the due process exception is not applicable.[19]

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18. The result reached in *Curry* was correct. We now determine that it was unnecessary to attempt to apply the *Waites* exception there.

19. Even if it could be argued that the due process exception applied, it would not call for a different result. The State filed no motion or motions opposing relator's motions for legislative continuance alleging that a substantial existing right would be defeated or abridged by delay. Although evidence was offered in opposition to the motions for continuance, there was no showing the State itself faced irreparable harm or that any substantial right would be defeated or abridged by the delay resulting from any continuance.

Raymond Gowdey, the 29-year-old stepson of the defendant, testified he had moved from the trailer house he was renting from appellant some distance from the home where the allegd offenses occurred. He testified he and his wife and baby were fearful but he had not seen the defendant until the hearing. Whether he was to be a witness at trial is not made clear by the record. When asked if he would be affected if the case was reset, he answered, "Well, myself, I think I could handle it pretty well."

Douglas R. Stewart, a neighbor, testified no one now lived at the house where the alleged offenses occurred, that he took care of the property and one morning saw tire tracks in the defendant's yard, but he had not seen the defendant there. He did not witness the alleged offenses but only saw the results of the "fight." He traveled and expressed some concern about his family while he was gone.

Jimmy Dale Collier, wife of the defendant and a complaining witness, testified she now lived in Houston and was in the process of a divorce, but had even left the State for a period of time due to fear of the defendant, that she was under the care of an osteopath, that her children lived in different places, that she was nervous and fearful the defendant would carry out previous threats. She had not seen nor heard from the defendant, who was out on bond, since the alleged offenses until the hearing.

Doyelle Maines, 16-year-old stepdaughter of the defendant and a complaining witness, testified she was living apart from her mother,

Respondent in his response also urges that § 30.003 is unconstitutional in light of the separation of powers doctrine, Article II, § 1, Texas Constitution. If it can be argued that the contention has been properly raised, it is observed that the Supreme Court of Texas rejected such contention in *Government Services Ins. Underwriters v. Jones,* supra, when interpreting Article 2168a, as amended 1949, supra, a forerunner of § 30.003, both being mandatory statutes dealing with the same subject matter. And the 1949 act is not at material variance with the current statute. Cf. Ex parte Summer, 158 S.W. 2d 310 (Tex. Cr. App. 1942).

While the doctrine of stare decisis should be controlling only if it makes sense or follows logical reasoning, it is a rule of precedent, Young v. State, 488 S.W.2d 820 (Tex. Cr. App. 1972), and creates a strong presumption in favor of established law. Gutierrez v. Collins, 583 S.W.2d 312 (Tex. 1979). The doctrine has its greatest force in the area of statutory construction. James v. Vernon-Calhoun Packing Co., 498 S.W.2d 160 (Tex. 1973); Tex. Ind. Traffic League v. Railroad Com'n. of Texas, 672 S.W.2d 548 (Tex. App.—Austin 1984). It has been said that where a statute has been reenacted by the Legislature with knowledge of the judicial construction thereof a court would not be justified in overruling such decision. Brown v. State, 196 S.W.2d 819 (Tex. Cr. App. 1946), cert. den., 331 U.S. 824.

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could not sleep at night, and was fearful of defendant though she had not seen him since the alleged offenses until the hearing.

The testimony given would be common testimony among prospective wtnesses in many criminal cases where the delay in trial is caused by reasons other than legislative continuances. Further, there is nothing to show that an immediate trial, regardless of the outcome, would change all witnesses' concerns, or that there were no other legal remedies available.

Further, as earlier noted, when a statute is of a nature that it might be construed in one court as well as another respect is to be given to the decision of the court giving the first interpretation. Redman v. State, 149 S.W. 670 (Tex. Cr. App. 1911). In King v. State, 273 S.W.2d 72 (Tex. Cr. App. 1954), such rule was applied. As explained in Jernigan v. State, 313 S.W.2d 309 (Tex. Cr. App. 1958), criminal courts will follow the policy of adopting the construction of a statute first given by civil courts, such policy being deemed necessary to the proper administration of justice and to the existence of harmony in the statute law of the State.

And the Supreme Court of Texas ordinarily follows the Court of Criminal Appeals in its interpretation of penal laws, Stokes v. Rogers, 165 S.W.2d 81 (Tex. 1942); Kadone v. Clark, 143 S.W.2d 197 (Tex. 1940); State v. Ferguson, 125 S.W.2d 272 (Tex. 1939); State ex rel. Shook v. All Texas Racing Ass'n., 97 S.W.2d 669 (Tex. 1936); Shrader v. Ritchey, 309 S.W.2d 812 (Tex. 1958). And such policy extends to situations where the Court of Criminal Appeals has declared a statute unconstitutional. State ex rel. Pettit v. Thurmond, 516 S.W.2d 119 (Tex. 1974).

We are well aware of the fact that there are out-of-state cases holding mandatory legislative continuance statutes unconstitutional on the basis of the separation of powers doctrine,[20] however, after due consideration of respondent's argument, a reexamination of Justice

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20. Williams v. Burdon's, Inc., 262 S.E.2d 881 (S.C. 1980); McConnell v. State, 302 S.W.2d 805 (Ark. 1957); Johnson v. Theodoran, 324 Ill. 543 (1927); *Kyger v. Koerper*, 207 S.W.2d 46 (Mo. 1946); *Booze v. District Court of Lincoln County*, 365 P.2d 589 (Okla. Crim. App. 1961).

Norvell's reasoning in *Government Services Ins. Underwriters v. Jones,* supra, and taking into account the doctrine of stare decisis and the past policy of this Court, we adhere to the Supreme Court's decision and overrule respondent's contention.

To justify mandamus relief, however, the relator must establish both that (1) he lacks any other adequate remedy at law, and that (2) the act sought to be compelled is purely ministerial as opposed to discretionary. State ex rel. Vance v. Routt, 571 S.W.2d 903 (Tex. Cr. App. 1978).

Of course, the relator would have the right to appeal if convicted after a trial on the merits with great expense to himself and the State. He could then raise the point of error that the trial court reversibly erred in overruling his motion for legislative continuance based on a mandatory statute. It is well established that failure to grant a mandatory legislative continuance will result in automatic reversal. Glover v. State, supra; Cuellar v. State, supra; King v. State, supra. A retrial or retrials could then ensue at great expense to both parties. The right of appeal could hardly be said to be a plain, effective and adequate remedy at law nor would it benefit the State or its witnesses.

> "The other remedy must not only be adequate in the general sense of the term, but must be specific and appropriate to the particular circumstances of the case, that is the remedy must afford relief on the very subject matter of the controversy and give the relator the particular right that the law affords him." Tex. Jur. 3rd. Extraordinary Writs, Vol. 38, § 127, p. 262.

In the traditional sense then relator Collier would not have another adequate remedy, by the way of appeal. Most important here, however, is that the real party at interest in the instant cause is State Representative Danburg and her own statutory right or privilege under said § 30.003 to a mandatory legislative continuance based on a well-established public policy.[21] The right of appeal by relator Collier could hardly be said to be another adequate remedy for lawyer/legislator Danburg.

Further, when there has been a compliance with the provisions of said § 30.003 in regard to a motion for legislative continuance, as in the instant case, and there is a showing that neither the statutory exception nor the due process exception is applicable, then the trial court has no discretion except to grant the motion, the statute being mandatory. The act of the court under such circumstances is ministerial in nature, not discretionary.

The relator and Representative Danburg are entitled to the relief sought. A proper basis has been shown for the issuance of a writ of mandamus ordering the respondent to vacate his orders denying the motions for continuance in Cause Nos. 459,914 and 459,915, and to grant such motions. Further, the order prohibiting Representative Danburg from being an attorney of record in said cause numbers must be set aside.

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21. In King v. State, 273 S.W.2d 72, 73 (Tex. Cr. App. 1954), it was held that the legislative continuance motion should have been granted although it was "a clear abuse of the privilege by one entitled to claim it under the statute." In Government Services Ins. Underwriters v. Jones, supra, it was also stated: "The statutory right or privilege of the legislator. . . ."

In accordance with this opinion we expect the respondent, Judge Poe, to take the appropriate action. If not, the writ of mandamus will issue.

It is so ordered.

ONION, Presiding Judge

White, J., concurs. McCormick, J., councurs in the result only.

(Delivered May 20, 1987)

En banc

Publish

APPENDIX B

CAUSE NOS. 459914, 459915

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
228th JUDICIAL DISTRICT

THE STATE OF TEXAS

v.

ROBERT JACK COLLIER

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The defendant was filed on for attempted murder of his wife and stepdaughter in Cause Nos. 459914, 459915 on October 2, 1986.
2. The defendant appeared in court for a "Probable Cause" hearing and bond reduction on October 6, 1986 with attorney David Bires representing the defendant.
3. Mr. David Bires has continuously represented the defendant since October 6, 1986. (See appendix B and C.)
4. The defendant was indicted in both cases on October 10, 1986.
5. On October 13, 1986, the defendant appeared in court with attorney David Bires. A Motion for Bond Reduction was filed by Mr. Bires. After an evidentiary hearing, bond was set in both cases at $20,000.-00. By agreement, both cases were set to October 28, 1986. The State announced ready for trial.

6. The defendant made bond in both cases on October 14. 1986.

7. The defendant and attorney Bires appeared in court on October 28, 1986. Both cases were set by agreement for November 7, 1986 for pre-trial motions and November 17, 1986 for trial.

8. On November 7, 1986, the defendant and attorney Bires appeared in court and pre-trial motions were presented and heard by the Court. A defense Motion for Continuance was denied.

9. On November 17, 1986, the State announced ready for trial. The defendant did not appear. His presence was waived. Attorney Bires appeared on behalf of the defendant. The case was held day to day since the defendant was not in court because of medical reasons.

10. On December 1, 1986, the State and defendant through his attorney David Bires were sent notice that the case would be set for trial on January 5, 1987.

11. On December 23, 1986, a Motion for Legislative Continuance was filed by Debra Danburg. The Honorable Debra Danburg is a duly elected member of the State Legislature of the State of Texas. Debra Danburg is further a qualified lawyer and member of the State Bar of Texas.

12. The Court set a hearing on this Motion for Legislative Continuance for January 2, 1987 and notified the State of Texas, the defendant through his attorney David Bires and Ms. Debra Danburg.

13. On January 2, 1987, the State, the defendant and attorney David Bires were present and ready for the hearing on the Motion. Ms. Debra Danburg did not appear. The Court heard evidence on the motion and denied the Motion for Continuance.

14. On January 2, 1987, the State presented evidence and argument in opposition to the defendant's request for continuance asserting that it, the State, would suffer irrefutable injury by the delay.

15. Ms. Debra Danburg has never made any court appearance for the defendant, Robert Collier, nor filed any pleadings for the defendant other than the Motion for Legislative Continuance. (see appendix B and C.)

16. The Court's docket is current. Pending cases are *100*. Trial cases are set within three weeks of request. The furtherest trial setting as of January 14, 1987 is February 2, 1987. The average time, from filing of charges to trial is 58 days. (See attachment.)

17. The Court finds that Ms. Debra Danburg, who has never appeared on the case, is not the attorney of record—lead counsel (although Ms. Debra Danburg could participate in the trial if present.) The attorney of record being David Bires.

18. Based on evidence presented on January 2, 1987, the State of Texas via its witnesses and the complainants in these cases if the trial were postponed:

    a. The alleged offense occured in the residence of Jimmy Collier, her daughter Doyelle Maines, and that of the defendant.

    b. State's witness, Raymond Gowdey, is afraid of the defendant and fearful for the safety of his wife and baby. The Gowdeys moved from their home on a belief that harm could come to them by the defendant. The defendant allegedly has made some prior threats to Raymond Gowdey.

    c. The complainant, Jimmy Dale Collier is an alleged gunshot victim and wife of the defendant (459914). She is fearful for the safety of herself and her family. She has "hidden" her children

in different cities and she has moved around for fear of her safety and her family's safety because of the defendant. She has left the State of Texas for a period of time due to this fear.

d. Jimmy Collier does not believe she would be "here" if the trial was postponed until mid-1987 because she believes she would be killed by the defendant or she would be "committed."

e. When she testified, she was visably shaken. She cried, she was trembling. She found it difficult to speak. She is afraid for her safety and the safety of her family because of the defendant.

f. She is seeking medical treatment for her nervous condition because of this offense.

g. The witness feels her condition is getting worse and the defendant will carry out his alleged threat to kill her.

h. The witness Doyelle Maines is the step-daughter of the defendant and an alleged gunshot victim. She is 16. She moved because of her fear of the defendant and that he would "do it again." She cannot sleep at night because of the offense. She is separated from her mother until the case is disposed of for fear of the defendant.

i. The witness Maines appeared distraught during her testimony and appeared to believe harm would come to her by the defendant if the case was postponed until mid-1987.

/s/ TED POE
TED POE, Judge
228th District Court
Harris County, TEXAS

CAUSE NOS. 459914, 459915

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
228TH JUDICIAL DISTRICT

THE STATE OF TEXAS

v.

ROBERT JACK COLLIER

CONCLUSIONS OF LAW

1. The granting or denying of continuances is a matter of discretion for the trial court.
2. The granting or denying of a legislative continuance is discretionary with the trial court if there is a showing of harm.
3. The remedy for abuse of discretion is appeal—not mandamus.
4. In these cases, harm would result to the State of Texas if the cases were postponed until mid-1987 because of the delay's impact on the complainants.
5. If there is no discretion in granting or denying a legislative continuance, then the statute is unconstitutional because:

   a. It violates Article 1, Section 13 of the Texas Constitution and denies equal access to the Courts.

   b. It violates the separation of powers between the Judiciary and the Legislature.

   c. It denies equal protection to attorneys who are not in the Legislature.

   d. It denies equal protection to members of the Legislature who are not attorneys.

e. There is no compelling State interest in granting a special class statute for members of the Legislature who are attorneys.

/s/ TED POE
TED POE, Judge
228th District Court
Harris County, TEXAS

APPENDIX C

IN THE
COURT OF.CRIMINAL APPEALS
OF TEXAS
AUSTIN, TEXAS

NO. 69,739

ROBERT JACK COLLIER,
Relator

v.

HONORABLE TED POE, JUDGE
228th DISTRICT COURT
HARRIS COUNTY, TEXAS,
Respondent

NOTICE OF APPEAL

To The Honorable Judges Of Said Court:

NOW COMES, THE HONORABLE TED POE, Judge of the 228th District Court of Harris County, Texas, by and through his attorneys, STANLEY G. SCHNEIDER and T. DONALD MORAN and hereby gives notice of appeal to the Supreme Court of the United States pursuant to 28 U.S.C. § 1257(2), requesting that the Court review the decision of this Court entered on May 20, 1987 conditionally granting a Writ of Mandamus requiring the Honorable Ted Poe to grant a legislative continuance pursuant to Texas Civil Practice and Remedies Code, § 30.003. Specifically, the Honorable Ted Poe is requesting the Supreme Court to determine whether § 30.003 violates prosecutors and victims rights to due

process within the meaning of the Fourteenth Amendment to the United States Constitution in criminal cases. The decision of the Court of Criminal Appeals was in favor of the validity of the state statute.

Respectfully submitted,

/s/ STANLEY G. SCHNEIDER
Stanley G. Schneider
T.B.C. #17790500
5300 Memorial, Suite 1000
Houston, Texas 77007
(713) 864-0362
ATTORNEY FOR APPELLANT

T. DONALD MORAN
T.B.C. #14422200
5430 Randon Road
Houston, Texas 77091
(713) 680-8462
Of Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been mailed to the Hon. Debra Danburg, House of Representatives, Capitol Building, Austin, Texas 78711, John B. Holmes, Jr., District Attorney of Harris County, 201 Fannin, Room 200, Houston, Texas 77002, Hon. Jim Mattox, Attorney General of Texas, Supreme Court Building, Austin, Texas 78711, David Bires, 2510 Montrose Blvd., Houston, Texas 77006, on this the 16th day of July, 1987.

/s/ STANLEY G. SCHNEIDER
Stanley G. Schneider

87-1413

Supreme Court, U.S.
FILED
AUG 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE HON. TED POE,
Appellant

v.

ROBERT JACK COLLIER,
Appellee

Appeal From The Court of Criminal Appeals of Texas
Cause No. 69,739

AMICUS CURIAE BRIEF IN SUPPORT OF JURISDICTIONAL STATEMENT

JOHN B. HOLMES, JR.
District Attorney
Harris County, Texas

CATHLEEN HERASIMCHUK
Assistant District Attorney

CALVIN A. HARTMANN
Chief, Legal Services Bureau
Counsel of Record

201 Fannin
Houston, Texas 77002
(713) 221-5826

Alpha Law Brief Co., Inc. — 8748 Westpark — Houston, Texas 77063 — 789-2000

37pp

QUESTIONS PRESENTED

1. Are "The State" and victims of crime, as statutorily represented by a Texas District Attorney, entitled to any protection under the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

2. Are "The State" and victims of crime entitled to invoke the same due process exception to a state legislative continuance law that similarly situated civil litigants are entitled to invoke?

LIST OF PARTIES

1. Appellant is the Hon. Ted Poe, Judge of the 228th Judicial District Court of Harris County, Texas.

2. Appellee is Robert Jack Collier, a defendant in the 228th Judicial District Court.

Other parties in interest include:

1. The Hon. John B. Holmes, Jr., District Attorney of Harris County, Texas.

2. The Hon. Debra Danburg, member of the Texas House of Representatives, one of Robert Jack Collier's attorneys.

3. Jimmie Dale Collier, wife of Robert Jack Collier, the complaining witness in Cause No. 459,914.

4. Doyelle Maines, the daughter of Jimmie Dale Collier, the complaining witness in Cause No. 459,915.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	I
LIST OF PARTIES	II
TABLE OF AUTHORITIES	IV
MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF	1
REASONS FOR FULL REVIEW	5
CONCLUSION	19
APPENDIX A—(*Noel v. State*, No. 827-83 (Tex. Crim. App., delivered March 14, 1984)	1a

TABLE OF AUTHORITIES

CASES — Page

Alta Enterprises Inc. v. Clark, 730 S.W.2d 865 (Tex. App. —Austin 1987) 8
Batson v. Kentucky, 106 S. Ct. 1712 (1986) 14
Bernstein v. Lower Moreland Township, 603 F. Supp. 907 (E.D. Pa. 1985) 13
Booth v. Maryland, 55 U.S.L.W. 4836, 4842 (June 16, 1987) 18
Collier v. Poe, No. 69,739 (Tex. Crim. App., delivered May 20, 1987) ..... *passim*
Condovest Corp. v. John Street Builders, Inc., 662 S.W.2d 138 (Tex. App.—Austin 1983, no writ) 6, 8
Curry v. Ater, 648 S.W.2d 10 (Tex. Crim. App. 1983) ... 8
Government Services Ins. Underwriters v. Jones, 368 S.W.2d 560 (Tex. 1963) 6
Hoobler v. State, 730 S.W.2d 755 (Tex. Crim. App. 1987) 15
King v. State, 160 Tex. Crim. 556, 273 S.W.2d 72 (1954) 6
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 19
Metropolitan Life Ins. Co. v. Ward, 105 S. Ct. 1676 (1985) 10
Miranda v. Arizona, 384 U.S. 436 (1966) 12
Morris v. Slappy, 461 U.S. 1 (1983) 13
New York v. Quarles, 467 U.S. 649 (1984) 12
Noel v. State, No. 827-83 (Tex. Crim App., delivered March 14, 1984) 15
Sax v. Votteler, 648 S.W.2d 661 (Tex. 1983) 3
Snyder v. Massachusetts, 291 U.S. 97 (1934) 11
South Carolina v. Katzenbach, 383 U.S. 301 (1966) 10, 11
State ex rel. Bryan v. McDonald, 681 S.W.2d 65 (Tex. Crim. App. 1984) 15
State ex rel. Turner v. McDonald, 676 S.W.2d 371 (Tex. Crim. App. 1984) 15
Thurmond v. Superior Court, 66 Cal. 2d 836, 59 Cal. Rptr. 273, 427 P.2d 985 (1967) 17
United States v. Hasting, 461 U.S. 499 (1983) 14
United States v. Salerno, 107 S. Ct. 2095 (1987) 12
Waites v. Sondock, 561 S.W.2d 772 (Tex. 1977) 8, 16, 17, 18

Page

STATUTES AND CONSTITUTIONS

Tex. Civ. Stat. Ann. art. 2168a (Repealed) 6
Tex. Civ. Prac. & Remedies Code Ann., section 30.003 (Vernon 1986) 6
Tex. Code Crim. Proc. Ann. art. 1.13 (Vernon 1977) ... 15
Tex. Code Crim. Proc. Ann. art. 2.01 (Vernon 1977) ... 2
Tex. Code Crim. Proc. Ann. art. 56.02 (Vernon Supp. 1987) 12
Tex. Code Crim. Proc. Ann. art. 56.02(c) (Vernon Supp. 1987) 2
Tex. Code Crim. Proc. Ann. art. 56.02(d) (Vernon Supp. 1987) 12
Tex. Code Crim. Proc. Ann. art. 56.03 (Vernon Supp. 1987) 12
Tex. Const. art. I, section 13 8
Tex. Const. art. I, section 19 8
Tex. Gov't Code, section 43.180(b) (Vernon 1986) 2
Tex. R. Crim. Evid. 412 12
U.S. Const. amend. XIV 3, 5, 10, 11, 16
Victim and Witness Protection Act of 1982, Pub. L. No. 97-291 § 2(a)(1), 96 Stat. 1248 (1982) 13

OTHER AUTHORITIES

Aynes, *Constitutional Considerations: Government Responsibility and the Right Not To Be a Victim,* 11 Pepperdine L. Rev. 63 (1984) 20
Black's Law Dictionary 1262 (rev. 5th ed. 1979) 10
Note, 42 Tex. L. Rev. 391 (1964) 6

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE HON. TED POE,
Appellant

v.

ROBERT JACK COLLIER,
Appellee

Appeal From The Court of Criminal Appeals of Texas
Cause No. 69,739

AMICUS CURIAE BRIEF IN SUPPORT OF JURISDICTIONAL STATEMENT

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

John B. Holmes, Jr., the duly elected District Attorney for Harris County, Texas, respectfully moves this court for leave to file the accompanying brief in this case as *amicus curiae*. The consent of the attorney for the appel-

lant herein has been obtained, and the attorney for the appellee herein has also given his consent to the submission of a brief by John B. Holmes, Jr., as *amicus curiae*.

The *amicus curiae*, as the District Attorney of Harris County, Texas, in whose jurisdiction this case arose, is the statutory representative of the State of Texas in all criminal cases prosecuted in Harris County.[1] Tex. Code Crim. Proc. Ann. art. 2.01 (Vernon 1977); Tex. Gov't. Code, section 43.180(b) (Vernon 1986). Mr. Holmes is also the statutory representative of crime victims in Harris County and is empowered to protect their rights. Tex. Code Crim. Proc. Ann. art. 56.02(c) (Vernon Supp. 1987).

While not a named party to this mandamus action, Mr. Holmes' interests, and those of all prosecutors and crime victims throughout the State of Texas, are vitally affected by the decision rendered by the Texas Court of Criminal Appeals in *Collier v. Poe*. In this case, the Texas Court of Criminal Appeals held that "the State is not entitled to the due process of law" in a criminal proceeding. Slip op. at 25a.[2] The Texas court, in its use of the phrase "the State," was referring directly to the *amicus*

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1. While the Office of the Attorney General for Texas wrote an *amicus curiae* brief in the Court of Criminal Appeals favoring the constitutionality of the legislative continuance statute, the Attorney General is not responsible for the rationale espoused by the Texas court. It seems inconceivable to this *amicus* that the chief law enforcement agent of a state would intend to condone, much less support, the proposition that neither he, nor any of the citizens who elected him, have any due process rights in a criminal trial.

2. All citations to the opinion rendered in *Collier v. Poe* are cross-referenced to Appendix A of the Appellant's Jurisdictional Statement.

curiae as the prosecutor of a criminal lawsuit. The decision in *Collier v. Poe* was based squarely upon a finding that neither prosecutors nor crime victims have any right to the protection of the Due Process Clause of the United States Constitution or Article I, sections 13 and 19 of the Texas Constitution. Slip op. at 27a & n. 19. While the Texas Constitution may grant greater due process protection to a litigant than does the federal constitution, *see, e.g., Sax v. Votteler,* 648 S.W.2d 661, 664 (Tex. 1983) ("we are of the opinion that the Texas Constitution, article I, section 13, does accord Texas citizens additional rights" to those guaranteed under the United States Constitution), a state constitution may not grant fewer or smaller due process rights than does the federal constitution. Thus, a blanket denial of any due process rights for "the State" necessarily rests on federal, not independent and adequate state, constitutional grounds.

While Judge Ted Poe of the 228th District Court of Harris County is the named respondent in this mandamus action, it is the *amicus curiae's* constitutional rights that were litigated. If the Texas court's ruling is allowed to stand unreviewed by this Court, and prosecutors, victims, and citizens are not considered "persons" for Fourteenth Amendment purposes, these groups will lose more than the right to assert an established due process exception to a state legislative continuance law. They will lose all claims to equal protection and substantive or procedural due process, including the right to notice and a fair hearing, in a criminal trial. Therefore, it is imperative that the *amicus curiae* be heard on the issue of whether he has any constitutional due process claim to the correct

interpretation and enforcement of criminal law in Harris County, Texas.

JOHN B. HOLMES, JR.
District Attorney
Harris County, Texas

CALVIN A. HARTMANN
Chief, Legal Services Bureau
Harris County District Attorney's Office
Attorney of Record

REASONS FOR FULL REVIEW

Although the decision rendered by the Texas Court of Criminal Appeals in *Collier v. Poe* might, at first blush, appear inconsequential in the over-all scheme of the American criminal justice system, this case starkly presents a fundamental issue of criminal jurisprudence that has not been directly addressed by this Court. Are there any constitutional restrictions on how the State, as the representative of its citizens, may be treated during the course of a criminal proceeding, or is Texas' highest criminal court correct when it repeatedly holds that "the State" has no due process rights or constitutional protection of the laws in criminal cases?

If *Collier v. Poe* stands unreviewed by this Court, Texas' highest criminal court would continue to be free to interpret the federal constitution in a way that leaves this state's law-abiding populace without any constitutional protection in a criminal proceeding. Courts would be free to rule by whim and caprice, disregarding state law and federal constitutional precedent, as long as these rulings redound to the benefit of the accused.

The *amicus curiae* submits that *Collier v. Poe* presents a question of first impression to this Court regarding whether the Fourteenth Amendment guarantees any due process rights to the accuser, as well as to the accused, in a criminal proceeding. This Court, as the final arbiter of the federal constitution, should exercise its appellate jurisdiction to address this issue which affects not only Texas citizens but every law-abiding citizen in the nation. If the Fourteenth Amendment does not protect "the State" in a Texas criminal proceeding, it does not protect "the State" in any jurisdiction.

A. The Decision Rendered in *Collier v. Poe* Deprives All Participants in a Criminal Proceeding, Other Than the Defendant, of Any Due Process Rights.

In *Collier v. Poe,* the Texas Court of Criminal Appeals held that a legislator-attorney has an absolute right to a legislative continuance in a criminal case during any Texas legislative session. Slip op. at 31a. If the provisions of the Legislative Continuance Statute, Tex. Civ. Prac. & Remedies Code Ann., section 30.003 (Vernon 1986) (formerly Tex. Civ. Stat. Ann. art. 2168a (Repealed)), have been met, the grant of a continuance is mandatory. Under the provision, a party's attorney in either a criminal or civil case may, by written affidavit, receive a continuance as of right for the entire period that the Texas Legislature is in regular or special session, as well as 30 days before and after those sessions. This statute applies to *any* attorney hired on a case,[3] even though, as in this case, the attorney has never appeared in court nor filed any pleading for the defendant prior to filing the affidavit for continuance (Jurisdictional Statement at 35a, Trial Court Findings of Fact, No. 15). Since Judge Poe

3. Both the Texas Supreme Court and the Texas Court of Criminal Appeals have noted that the legislative continuance law is subject to enormous abuse. *See King v. State,* 160 Tex. Crim. 556, 273 S.W.2d 72, 73 (1954) (evidence fully supported trial court's finding "that the application was a clear abuse of the privilege by one entitled to claim it under said statute"); *Government Services Ins. Underwriters v. Jones,* 368 S.W.2d 560, 565 (Tex. 1963) ("The statutory right or privilege of the legislator is undoubtedly subject to abuse"); *Condovest Corp. v. John Street Builders, Inc.,* 662 S.W.2d 138, 140-41 (Tex. App.—Austin 1983, no writ) (legislative continuance denied; legislator made no appearances, did no work on case); *see also,* Note, 42 Tex. L. Rev. 391, 397 (1964) (mandatory legislative continuance is proper only if it is not "arbitrary" and does not "operate to deny a fair opportunity to repel it").

denied Collier's motion for a legislative continuance, the Texas Court of Criminal Appeals announced that it would issue a writ of mandamus against the trial judge if he did not grant the continuance forthwith. Slip op. at 32a.

Thus, a criminal trial judge has neither the authority nor the power to consider any countervailing factors, no matter how important these interests might be. The sole eyewitness to a murder might be dying of cancer, the child abuse victim might still be living in the same house as the defendant, the robbery victim might be moving to Afghanistan, nonetheless, under *Collier v. Poe,* the trial judge may not balance these concerns against the absolute right of an attorney-legislator to a continuance.

There are many cases in which both the defense and the prosecution are well aware that the State's sole or main witness will soon be, for one reason or another, permanently unavailable. By the simple expedient of hiring on a legislator-lawyer, the defense can automatically delay any criminal trial until 30 days after the last legislative session and hope that the witness will have died, moved away, or somehow become unavailable during that time. As quoted by the Court of Criminal Appeals, Judge Poe's assessment of the statute, that it is "a self-serving law passed by the legislators for their own self-preservation," was not disputed by the very court that upheld its mandatory terms. Slip op. at 2a. In the present case, for example, Representative Danburg filed her legislative motion for continuance fourteen days before the second trial setting (Jurisdictional Statement, Finding of Fact No. 11, at 34a). Her name was never mentioned during the pre-trial hearing or the first trial setting (Jurisdictional Statement, Findings of Fact Nos. 8 & 9, at 34a). She did not even appear at the hearing

on her own motion (Jurisdictional Statement, Findings of Fact No. 13, at 34a).

In 1977, the Texas Supreme Court held that a mandatory continuance under the legislative continuance statute would "violate the due process clause of the Fourteenth Amendment of the United States Constitution and Article I, sections 13 and 19 of the Texas Constitution." *Waites v. Sondock*, 561 S.W.2d 772, 773 (Tex. 1977). Thus, to preserve the constitutionality of the statute, the court held that a trial judge had discretion to deny a legislative continuance "when the non-moving party faces irreparable harm." *Id.* at 776. *See also, Condovest Corp. v. John Street Builders, Inc., supra,* at 140-41; *Alta Enterprises Inc. v. Clark,* 730 S.W.2d 865, 866-67 (Tex. App.—Austin 1987). While the Texas Supreme Court deals only with civil matters, the Texas Court of Criminal Appeals adopted the due process exception of *Waites v. Sondock* in *Curry v. Ater,* 648 S.W.2d 10, 12 (Tex. Crim. App. 1983).

In *Collier v. Poe,* the court jettisoned its own precedent by finding that it is irrelevant that crime victims would suffer irreparable harm[4] since they are not "the State itself," and that the State itself has no standing to assert

4. *See* Jurisdictional Statement at 35a-36a, Findings of Facts No. 18. Judge Poe found that one of the complainants, the defendant's wife, had fled the state for a period of time because of her fear of the defendant, and she had "hidden" her children in different cities. While she was testifying, she was visibly shaking, trembling, and crying. She sought medical treatment for a nervous condition caused by this offense. She believed that, if the trial were postponed, either the defendant would kill her or she would suffer a nervous breakdown. Her 16 year old daughter, the second complainant, was distraught, could not sleep at night, and was living apart from her mother because of her fear that the defendant, who was out on bond, would carry out his threats to kill her mother.

due process rights. Slip op. at 26a & n. 19. Thus, the prosecution side of a Texas criminal cause is caught in a Catch 22: victims, who are individuals, are not "the State itself"; therefore, they cannot assert any right to due process protection; "the State," since it is not an individual, cannot assert any right to due process protection. The absurd logical conclusion, then, is that no one in a criminal case has any right to due process except the defendant.

This case, however, is not about balancing a *defendant's* constitutional due process rights against those of "the State" or victims, but about mandatory statutory rights of a hired attorney. The Texas court did not mention, much less rely upon, any Sixth Amendment right to counsel on the part of the defendant. In fact, there was no mention of any of the defendant's rights, constitutional or otherwise, except that of an automatic reversal for the failure to grant a mandatory legislative continuance. Slip op. at 30a. Instead, the court stated that "the real party at interest in the instant cause is State Representative Danburg." Slip op. at 31a. Thus, the court held that an unnamed party to the lawsuit, an attorney who was not the attorney of record, had not made any appearances in the courtroom, and had not filed any pleadings for the defendant, (see Jurisdictional Statement, Findings of Fact at 35a), had not merely a cognizable, but the dominant, interest in a lawsuit. Conversely, the complainants, Jimmy Dale Collier and her daughter Doyelle Maines, who had allegedly been shot by the defendant, who were present and testified at the hearing to their trauma and continuing fear and harm, had no cognizable interest in the lawsuit since they were not "the State itself." Slip op. at 27a, n. 19. Apparently, then, defend-

ants and legislator-defense attorneys are the only two groups that have cognizable interests in a criminal trial.

Although the rights of "the State" in a criminal trial can be no greater than the rights of a single individual within that society, they can be no less either. As the Texas Court of Criminal Appeals noted in its opinion, the *amicus curiae* represents the State in all Harris County criminal cases. Slip op. at 25a. It defined "the State" as "the people of a state, in their collective capacity, considered as the party wronged by a criminal deed; the public." Slip op. at 24a (quoting Black's Law Dictionary 1262 (rev. 5th ed. 1979)). By the court's own definition, then, "the State" is not an amorphous non-being, incapable of having or asserting rights. It is, instead, a collection of individuals, each of whom have due process rights under the Fourteenth Amendment. Surely, if the giant corporations of America are "persons" entitled to the protection of the Fourteenth Amendment, *see, e.g., Metropolitan Life Ins. Co. v. Ward,* 105 S. Ct. 1676, 1683, n. 9 (1985), it cannot fairly be said that those who enforce and uphold the rights of citizens in a criminal trial deserve less. The preservation of wealth is not more deserving of constitutional protection than the preservation of life.

The Texas court cited *South Carolina v. Katzenbach,* 383 U.S. 301 (1966), and several other federal cases for its proposition that the State itself and its agencies and political subdivisions are not entitled to the protection of the Fourteenth Amendment. Slip op. at 25a. The *amicus curiae* can only conclude that the court has misconstrued the *Katzenbach* statements. That case, as well as its progeny, stands for the proposition that a State, or any other political entity, cannot use the Fourteenth

Amendment as a sword to invalidate either federal law or its own state law. *Katzenbach, supra,* at 323-24. These cases, however, say nothing about a political entity, such as a district attorney's office, using the Fourteenth Amendment as a shield to protect itself from the incorrect interpretation or application of federal or state law. In fact, the Fourteenth Amendment *must* be available for the prosecution side of a criminal trial or else the State could never have a trial objection sustained, insist upon proper criminal procedure, or appeal a trial court's legal rulings.

Indeed, this Court has innumerable times held that society does have cognizable interests, interests that *must* be balanced against those of a defendant in a criminal trial. As early as 1934, Justice Cardozo stated that:

> The law, as we have seen, is sedulous in maintaining for a defendant charged with crime whatever forms of procedure are of the essence of an opportunity to defend. Privileges so fundamental as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men will be kept inviolate and inviolable, however crushing may be the pressure of incriminating proof. *But justice, though due to the accused, is due to the accuser also.* The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.

Snyder v. Massachusetts, 291 U.S. 97, 122 (1934) (emphasis added) (upholding right of trial court to take jury to view scene of crime without defendant present). As recently as the past term, this Court stated that: "We have repeatedly held that the government's regulatory interest in community safety can, in appropriate circum-

stances, outweigh an individual's liberty interest." *United States v. Salerno,* 107 S. Ct. 2095, 2102 (1987). This Court is regularly in the business of weighing the costs to society against the benefits to a defendant in finding the proper balance between their respective rights. *Compare Miranda v. Arizona,* 384 U.S. 436, 479-81 (1966) (costs to society in possibility of fewer convictions deemed acceptable when weighed against interest of enlarged protection for Fifth Amendment privilege), *with New York v. Quarles,* 467 U.S. 649, 658-59 (1984) ("need for answers to questions in a situation posing a threat to public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination"). If it were true that society, in whose name "the State" acts, had no substantive or procedural due process rights, then this Court would not balance those non-rights against the due process rights of a defendant.

In Texas, a crime victim does not have standing to participate as a party in a criminal proceeding. Tex. Code Crim. Proc. Ann. art. 56.02(d) (Vernon Supp. 1987). Yet, Texas law recognizes certain legal rights on the part of a victim. *See, e.g.,* Tex. Code Crim. Proc. Ann. art. 56.02 (Vernon Supp. 1987) (crime victim's rights); Tex. Code Crim. Proc. Ann. art. 56.03 (Vernon Supp. 1987) (provision for judicial consideration of victim impact statements); Tex. R. Crim. Evid. 412 (rape shield law).

Indeed, in 1982, the United States Congress recognized that:

> Without the cooperation of victims and witnesses, the criminal justice system would cease to function;

> yet with few exceptions these individuals are either ignored by the criminal justice system or simply used as tools to identify and punish offenders.

Victim and Witness Protection Act of 1982, Pub. L. No. 97-291 § 2(a)(1), 96 Stat. 1248, 1248 (1982). One of the self-stated purposes of the Victim and Witness Protection Act was "to enhance and protect the necessary role of crime victims and witnesses in the criminal justice process." *Id.*, section (b)(1), at 1249. *See also, Bernstein v. Lower Moreland Township,* 603 F. Supp. 907, 911, n. 3 (E.D. Pa. 1985) ("The Act creates a special relationship between victims and witnesses and the federal government and establishes rights and obligations arising out of the statute having the force of law"). Thus, both federal and Texas statutory law recognize the importance of addressing the rights of crime victims in a criminal trial. So does this Court.

In *Morris v. Slappy,* 461 U.S. 1, 14 (1983), Chief Justice Burger addressed the importance of considering the interests of victims in a context precisely analogous to the present one, that of a trial court denying a defendant's motion for continuance. He stated:

> In its haste to create a novel Sixth Amendment right, the [Court of Appeals] wholly failed to take into account the interest of the victim of these crimes in not undergoing the ordeal of yet a third trial in this case. Of course, inconvenience and embarrassment to witnesses cannot justify failing to enforce constitutional rights of an accused: when prejudicial error is made that clearly impairs a defendant's constitutional rights, the burden of a new trial must be borne by the prosecution, the courts, and the witnesses; the Constitution permits nothing less. *But*

> *in the administration of criminal justice, courts may not ignore the concerns of victims.* . . . Precisely what weight should be given to the ordeal of reliving such an experience for the third time need not be decided now; *but that factor is not to be ignored by the courts.*

Id. at 14 (emphasis added); *see also United States v. Hasting*, 461 U.S. 499, 528 (1983) (Brennan, J., & Marshall, J., concurring in part and dissenting in part) (victims' interests may be relevant in determining whether to reverse a case based on harmless error). The Court of Criminal Appeals now stands ready to issue a writ of mandamus against Judge Ted Poe for doing exactly what Chief Justice Burger told him to do.

This Court has recently held that a potential juror has a cognizable interest in a criminal trial. *See Batson v. Kentucky*, 106 S. Ct. 1712, 1718 (1986) ("[B]y denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror. . . . The harm from discriminating jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community."). If a potential juror has a cognizable constitutional interest in a criminal trial, there is no conceivable justification for holding that an individual crime victim, the person directly harmed by the defendant's act, is not entitled to a scintilla of constitutional protection.

If the State cannot assert due process rights in a criminal trial, as the statutory representative of either the collective society or an individual victim or witness, no one is entitled to assert any rights contrapoised to those of the criminal defendant. The logical extension of the holding in *Collier v. Poe* is that the prosecution

side of a criminal trial has no standing to complain when courts, at either the trial or appellate level, do not follow the law. Thus, a trial judge could dismiss a case merely because the defendant pled not guilty, despite the vehement opposition of the prosecutor. A judge could stop the prosecutor mid-way through a trial and declare that there is insufficient evidence to convict before the State has rested its case. If a prosecutor stood up to make a trial objection, the trial court could blithefully ignore him. If the State has no protectible substantive due process rights, it has no protectible procedural due process rights and thus is not entitled to fair notice and a hearing.

The Texas Court of Criminal Appeals has already used this rationale for holding that a felony defendant may unilaterally waive his right to a jury trial without the State's approval, even though Texas law plainly requires the prosecutor's consent. Tex. Code Crim. Proc. Ann. art. 1.13 (Vernon 1977); *see and compare State ex rel. Bryan v. McDonald,* 681 S.W.2d 65, 66 (Tex. Crim. App. 1984) *with State ex rel. Turner v. McDonald,* 676 S.W.2d 371, 373-74 (Tex. Crim. App. 1984). That same defendant who waived a jury trial and entered a plea to the court over the State's opposition, may later invalidate his conviction on the basis that the jury waiver was not signed by the State. *Hoobler v. State,* 730 S.W. 2d 755, 756 (Tex. Crim. App. 1987). The State, however, cannot prevent the court from accepting that improper plea. *Bryan v. McDonald, supra,* at 66.

In another, as yet unpublished, opinion, *Noel v. State,* No. 827-83 (Tex. Crim. App., delivered March 14, 1984) (See Appendix A), the court held that the State is not entitled to raise fundamental unassigned error at the appellate level although the defendant is so entitled

because "we find no analogous constitutional guaranty *to*, or protection *of*, the State, to those contained in the Due Process Clauses of our State and Federal constitutions protecting citizens." *Id.*, Amicus Appendix A at 7a (emphasis in original).[5] The *amicus* submits that his concerns regarding the State's right to complain of any substantive or procedural error is in jeopardy. Trial and appellate judges are free to misinterpret, misapply, and generally mangle federal or state law with impunity if the State has no substantive or procedural due process.

Indeed, the *amicus curiae* suggests that the Texas Court of Criminal Appeals was simply mistaken when it asserted, in *Collier v. Poe*, that neither "the State" nor victims of crime, as represented by the prosecutor, have any right to the protection of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

B. Victims of Crime and "the State" Are Deprived of the Right to Invoke the Same Due Process Exception to a State Legislative Continuance Law that Similarly Situated Civil Litigants Are Entitled to Invoke.

By rejecting the *Waites v. Sondock* due process "irreparable harm" exception to the legislative continuance law, the Texas Court of Criminal Appeals has discriminated against a particular class of citizens, crime victims,

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5. Four judges "vigorously" dissented to "the majority's denial of the State to have equal access to the Court." *Id.* Amicus Appendix A at 10a (McCormick, J., joined by Onion, P. J., Davis, & Campbell, J.J., dissenting). Presiding Judge Onion wrote the opinion in *Collier v. Poe*, and not a single judge dissented from the present holding which would effectively deny the State *any* due process right of access to the court. *Tempora mutantur, nos et mutamur in illis.*

without any rational basis. The legislative continuance law applies equally to civil and criminal cases. Logically, then, a constitutionally required due process exception to its mandatory terms would apply equally to civil and criminal litigants unless there were some rational basis to treat these similarly situated groups differently.

Civil and criminal litigants have equal rights to constitutional protection. Crime victims are citizens. They, like all citizens, are entitled to equal protection under the Fourteenth Amendment. By becoming a crime victim, they are not simultaneously robbed of their membership in that class of citizens entitled to equal protection of the laws. The Texas court dismissed any constitutional standing by Jimmie Collier and her daughter because they were not the named litigants, not "the State itself." Slip op. at 23a, n. 19. *Waites v. Sondock,* however, never made any distinction between named and unnamed litigants. Instead, it carved out an exception to what would otherwise be an unconstitutional law by holding that a legislative continuance is not mandatory "in those cases in which the party opposing the continuance alleges that a substantial existing right will be defeated or abridged by delay." *Id.* at 776. This "substantial existing right" need not be a right of the named litigant; it refers to a substantial right by *any* person. Indeed, in *Waites v. Sondock,* the aggrieved party was the child, not the mother who was bringing the action. "The mother here claims that the support payments are critical to her ability to feed and support her children." *Id.* at 774. Late payments "will not compensate *the child* for any injury resulting from the mother's present inability to care for the child." *Id.* at 775. *See also, Thurmond v. Superior Court,* 66 Cal. 2d 836, 59 Cal. Rptr. 273, 427 P.2d 985 (1967) (cited

in *Waites;* there it was the guardian who was the named litigant asserting the rights of the mother and her unborn child in a pending paternity suit). Thus, there was no basis for the court in *Collier v. Poe* to dismiss the victims' harm as irrelevant merely because they were not "the State itself," though they were, of course, named parties as the alleged complainants.

Crime victims and citizens do have legitimate interests in a criminal trial and these interests must be balanced against the rights of a defendant, even though, in some instances, they may be found less weighty. Just this past term, four members of this Court were willing to uphold admission of a victim impact statement in the sentencing phase of a capital murder case. *Booth v. Maryland,* 55 U.S.L.W. 4836, 4842 (June 16, 1987) (Scalia, J., joined by Rehnquist, C.J., White and O'Connor, J.J., dissenting). Justice Scalia expressed well the concerns felt throughout this nation regarding the present plight of crime victims within the American criminal justice system.

> Recent years have seen an outpouring of popular concern for what has come to be known as "victims' rights"—a phrase that describes what its proponents feel is the failure of courts of justice to take into account in their sentencing decisions not only the factors mitigating the defendant's moral guilt, but also the amount of harm he has caused to innocent members of society. Many citizens have found one-sided and hence unjust the criminal trial in which a parade of witnesses come forth to testify to the pressures beyond normal human experience that drove the defendant to commit his crime, with no one to lay before the sentencing authority the full reality of human suffering the defendant has produced--which (and *not* moral guilt alone) is one

> of the reasons society deems his act worthy of the prescribed penalty.

Id. at 4842. Even when the victims' interests are found to be an insufficient counterweight to the special constitutional protections afforded criminal defendants, nothing in the constitution prevents consideration of those interests. It is unlikely that our criminal justice system will long endure if trial judges are *required* to ignore the harm done to victims when exercising their judicial discretion, and appellate judges declare crime victims "nonpersons" for constitutional purposes in a criminal trial.

To permit the Texas court's holding that a crime victim, as opposed to a civil suit victim, has no rights that even bear consideration on the issue of "irreparable harm" such as to deny a legislative continuance, not only denies that victim *equal* protection of the law, it denies him *any* protection. But as long ago as 1803, in *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 163 (1803), this Court held that "[t]he very essence of civil liberty certainly consists of the right of *every individual* to claim the protection of the laws, *whenever he receives any injury.* One of the first duties of government is to afford that protection . . ." *Id.* at 163 (emphasis added). The *amicus* respectfully requests this Court to redress the wrong that has been done not only to Jimmie Collier and her daughter, but to all present and potential crime victims in the State of Texas in denying them any protection of the law.

CONCLUSION

In *Collier v. Poe,* the Texas Court of Criminal Appeals stated that neither "the State," as the representative of its citizens, nor crime victims are entitled to invoke the pro-

tection of the Due Process Clause of the Fourteenth Amendment. The *amicus curiae* submits that this decision turns the criminal justice system upside-down. The State was originally made a partner in the criminal justice system to protect innocent citizens from criminals and to vindicate the victim's rights. *See* Aynes, *Constitutional Considerations: Government Responsibility and the Right Not To Be a Victim,* 11 Pepperdine L. Rev. 63, 72 (1984). Have we come so far from our beginnings that we are prepared to state that *only* defendants have due process rights in a criminal proceeding? That is the question directly presented by *Collier v. Poe,* and it is one that only this Court, as the final expositor of the United States Constitution can answer.

Respectfully submitted,

JOHN B. HOLMES, JR.
District Attorney
Harris County, Texas

CATHLEEN HERASIMCHUK
Assistant District Attorney

CALVIN A. HARTMANN
Chief, Legal Services Bureau
Counsel of Record

201 Fannin
Houston, Texas 77002
(713) 221-5826

APPENDIX A

NO. 827-83

MICHAEL STEVEN NOEL,
Appellant

v.

THE STATE OF TEXAS,
Appellee

Petition for Discretionary Review from the Court of Appeals, Fifth Supreme Judicial District of Texas [DALLAS County]

OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

Before us on appellant's petition for discretionary review is a conviction for involuntary manslaughter, affirmed by the Dallas Court of Appeals in an unpublished opinion.

Appellant's sole ground of error on direct appeal contended the trial court erred in overruling his motion to discharge filed pursuant to Chapter 32A, V.A.C.C.P., the Speedy Trial Act (the Act), because the State was not ready to try him within 120 days of the commencement of the prosecution against him.

The court of appeals found 155 days elapsed between the day appellant was indicted and the day the State first announced ready;[1] that court, however, declined to reach the merits of the contention for the stated reason that

1. On remand, the court of appeals should carefully reassess the record in this regard.

appellant failed to "present his motion to dismiss before the day of trial," citing Art. 32A.02, § 3, V.A.C.C.P. and several decisions from other courts of appeals.[2]

We granted appellant's petition for discretionary review to determine whether Article 32A.02, § 3, supra, (or any other provision) requires an accused to file his Chapter 32A motion to dismiss "before the day of trial," or waive his rights under the Act.

Our review of the decisions relied on by the court of appeals reveals the cited rule is traceable only to *obiter dictum* written in Finch v. State, 629 S.W.2d 876 (Tex. App.—Fort Worth 1982), which was reversed by this Court for the reason, *inter alia,* that "the motion was in fact timely filed and urged under Article 32A.02, § 3, supra."[3] In addition to being unnecessary to the Fort Worth Court of Appeals' decision, the purported rule was simply announced without cited authority or supporting reasoning in *Finch,* supra.

Accordingly, since we have neither the reasoning nor analysis impelling the court of appeals' decision in this case, we turn to the wording of the statute in issue.

Article 32A.02, § 3, supra, provides:

> "The failure of a defendant to move for discharge under the provisions of this article *prior to trial* or

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2. As cited by the court below:
"Maddox v. State, 635 S.W.2d 456, 458 (Tex. App.—San Antonio 1981, no p.d.r.); Kennedy v. State, 630 S.W.2d 509, 510 (Tex. App.—Fort Worth 1981, no p.d.r.); Finch v. State, 629 S.W.2d 877, 878 (Tex. App.—Fort Worth 1982, rev'd on other grounds, 643 S.W.2d 414 (Tex. Crim. App. 1982); De La Rosa v. State, 627 S.W.2d 207, 211 (Tex. App.—San Antonio 1981, no p.d.r.)."

3. Finch v. State, 643 S.W.2d 414, 415 (Tex. Cr. App. 1982).

> the entry of a plea of guilty constitutes a waiver of the rights accorded by this article."[4]

As a matter of statutory construction, it is initially apparent that the statute is not ambiguous on its face. It does not state the pertinent motion must be made "two weeks prior to trial;" nor does it require its filing "one day prior to trial." Since the statute is unambiguous, no question of statutory construction arises.

Finally, as a matter of public policy, it is clear that questions directed to the very power of the court to resolve criminal controversies[5] must be raised before trial proceedings actually begin; at risk is judicial economy in general and the trial judge's control of his court in particular.

Responsive to these policies, the Legislature has placed the duty on one seeking to defeat the court's jurisdiction to try him, to launch his attack before that authority is exercised. And in similar contexts (but without legislative guidance) such motions have been variably deemed timely when urged prior to announcement of ready[6] or so long as testimony has not yet begun.[7] That the above

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4. All emphasis is supplied by the writer of this opinion unless otherwise indicated.

5. This would include an attack on the State's pleadings or any other complaint which, if sustained, would necessitate a delay of trial, as well as pure questions of jurisdiction.

6. Compare, e.g., Graham v. State, 502 S.W.2d 809 (Tex. Cr. App. 1973); and Burkett v. State, 485 S.W.2d 578 (Tex. Cr. App. 19) with Tone v. State, 505 S.W.2d 300 (Tex. Cr. App. 1974) (Opinion on Appellant's Motion for Rehearing); and Dempsey v. State, 496 S.W.2d 49 (Tex. Cr. App. 1973).

7. E.g., Garner v. State, 545 S.W.2d 178 (Tex. Cr. App. 1977).

policies are fully effectuated thereby is implicit in these holdings.

Thus, when the record reflects these policies have in no way been frustrated and the trial court has considered and ruled on the merits of the motion, we discern no licit interest of reviewing courts in holding the motion untimely; see, e.g., Matte v. State, 572 S.W.2d 547 (Tex. Cr. App. 1978); this is particularly so when, as here, such a holding is contrary to the clear language of the governing procedural statute.

We hold the court of appeals erred by refusing to consider the correctness of the trial court's ruling on appellant's Chapter 32A motion to dismiss[8] on the ground that appellant failed to move for dismissal at some time before the day of trial, and the cases relied on by the court of appeals are therefore overruled.

This cause must accordingly be remanded to the court of appeals for consideration of appellant's ground of error.

The State, in opposing this petition for review, has made two arguments before this Court which will be addressed in the interest of judicial economy.

First, by both brief and oral argument, the State has vehemently assailed the sufficiency of appellant's Chapter 32A motion. Contending the motion makes only "the conclusory allegation" that "the State was not ready within the act's time limits,"[9] the State claims an ac-

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8. Appellant's ground of error in the court below alleged: "The trial court erred in failing to dismiss the indictment for want of speedy trial within 120 days."

9. The record reveals appellant's motion actually alleged in pertinent part that "the State was not ready *within 120 days* as required by Art. 32.02A of the Code of Criminal Procedure."

cused's motion to dismiss should "set forth facts which, if true, would entitle [him] to relief under the provisions of the act." The State has not elaborated on exactly *what* facts would entitle an accused to relief other than those alleged in the instant case.[10]

We agree with the State to the extent it would be the better practice for the moving defendant to aver the date the criminal action commenced by virtue of the applicable event (indictment, information, complaint, or arrest) in his Chapter 32A motion to discharge. By the same token, it would be preferable for the prosecution to aver in the written announcements of ready which are apparently routinely filed throughout the State, what preparation has been made in support of the conclusion that the State is in fact ready for trial. Factual elaboration by both parties in these respects would be of great assistance to the trial court in circumscribing and resolving the issues raised and for this reason, it is encouraged.

But the fact remains that if an accused can prove in an adversarial proceeding exactly what was alleged here, he *is* entitled to relief;[11] and if he cannot disprove what the State has alleged in its written announcement of ready, he is not entitled to relief. The burdens presently placed

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10. We presume the State does not suggest defendants should negate by pleading all the statutory exclusions contained in Article 32A.02, § 4, since before a material issue arises as to the State's entitlement to a statutory exclusion of time, the trial court must find, or the State must necessarily concede that it was not ready within the initial 120 day period while asserting and demonstrating that its posture in this regard has been due to something other than prosecutorial neglect. In other words, the "exclusions" are in the nature of "confession and avoidance" and inure solely to the benefit of the State.

11. But see n. 10, *ante*.

on the accused seem adequate to protect whatever interest the State might have in the wording of the former's motion to discharge.

We accordingly hold a motion to dismiss or discharge filed pursuant to Chapter 32A, is sufficient to entitle the accused to an opportunity to present evidence on issues raised thereby if, when reasonably construed, it informs the trial judge of the basis of his complaint. See Zillender v. State, 557 S.W.2d 515 (Tex. Cr. App. 1977).

Finally, in oral argument before this Court, the State contended the caption to the legislation creating the Speedy Trial Act is defective and the Act therefore unconstitutional under Ex parte Crisp, et al., 661 S.W.2d 944 (Tex. Cr. App. 1983). Unlike *Crisp,* however, the State neither raised this argument in the trial court, nor in the court of appeals. And since no petition for discretionary review was filed in this court on behalf of the State, counsel for the State was asked by what procedural vehicle the issue might be considered before the court. Conceding no statutory authority exists for it, counsel for the State urged our consideration of the issue as an "unassigned error" on the rationale expressed in Carter v. State, 656 S.W.2d 468 (Tex. Cr. App. 1983).

In *Carter,* supra, we rejected the State's claim that no statutory or *constitutional* authority existed for a court of appeals' consideration of fundamental unassigned error upon the appeal of a judgment of conviction. A careful reading of *Carter* makes it clear an appellate court's authority to review matters of a "fundamental" nature flows from the constitutional assurance of the course of law due those whose life or liberty is sought to be affected by the State. Also called "fundamental fairness," these

processes are guaranteed citizens *by* the State.[12] (Or, in the context of the Federal Constitution, States are *prohibited from depriving* "any person of life, liberty, or property without due process of law." Amendment XIV, Section 1.)

In sum, we find no analogous constitutional guaranty *to,* or protection *of,* the State, to those contained in the Due Process Clauses of our State and Federal constitutions protecting citizens. Thus, the rationale of *Carter,* supra, is inapposite.

We hold the State's failure to pursue the orderly procedure for discretionary review in raising the constitutional claim now urged, presents nothing for review in this court on the merits.

The judgment of the court of appeals is reversed; this cause is remanded to the court of appeals for consideration of appellant's speedy trial claim.

It is so ordered.

CLINTON, Judge

(Delivered March 14, 1984)

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12. *"No citizen* of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." Tex. Const. Art. 1, § 19.

CONCURRING OPINION

The dissenting opinion fails to grasp the holding of Ex Parte Crisp, 661 S.W.2d 944 (Tex. Cr. App. 1983) (motion for rehearing denied with written opinion, 661 S.W.2d 956). The caption dealt with in *Crisp*, supra, reads as follows:

> "An act relating to offenses and criminal penalties under the Texas Controlled Substances Act." *Crisp*, supra at 949.

The caption of the Speedy Trial Act reads as follows:

> "AN ACT relating to a speedy trial of criminal cases; amending the Code of Criminal Procedure, 1965, as amended by adding Chapter 32A, by adding Articles 17.151 and 28.061, and by amending Articles 29.02 and 29.03; providing for an effective date; and declaring an emergency. Acts 1977, 65th Legislature, ch. 787, p. 1970."

Although the two above-mentioned captions both use the words "relating to," the State is in error if it assumes that our holding in *Crisp* means that all captions containing the words "relating to" will be held defective. As stated by Judge Clinton in his concurring (majority on rehearing) opinion in *Crisp*:

> "The instant caption says only that the bill is an act *relating* to something else. It does not even tell the reader that the act is to *amend* any part of the Texas Controlled Substances Act. As stated it gives no hint of what is its 'general purpose'—its proposed content." (emphasis in original) *Crisp*, supra at 950.

As further stated by Judge Odom on rehearing in *Crisp*, supra,

> "[Judge Clinton's] opinion expressed the view that the caption was utterly insufficient to express even a single subject. . . ."
>
> * * *
>
> "We hold the caption is utterly defective for the reason stated in [Judge Clinton's] opinion on original submission, and overrule the state's motion for rehearing. It requires little imagination to see how the requirement of Art. III, Sec. 35, supra, would be rendered totally useless if the caption in this case were sufficient. In the future it would be sufficient to use one of the few standard form captions, such as 'An act relating to the Penal Code,' 'An Act relating to the Code of Criminal Procedure,' 'An Act relating to the Family code,' etc." *Crisp*, supra at 957 (on rehearing).

A "speedy trial" *is* a specific subject whereas the Texas Controlled Substances Act is much more than a subject. Moreover, the caption in the Speedy Trial Act does inform the reader that the Code of Criminal Procedure will be amended and that new sections will be added. In no way can our holding in *Crisp*, supra, be authority for declaring the Speedy Trial Act caption violative of Art. III, Sec. 35 of the Texas Constitution.

Accordingly, I concur in the judgment of the Court in remanding the case to the Court of Appeals for consideration of appellant's speedy trial claim.

Miller, Judge

DISSENTING OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

Today the majority sidesteps a most urgent and important issue by chastising the State for failing to urge its *response* to appellant's arguments through the "orderly procedure for discretionary review." Since when does a response urged by one of the parties before this Court present nothing for review?

Appellant sought discretionary review and relief from his conviction based on an alleged violation of the Speedy Trial Act. The State responded: first, that the record did not support appellant's contention and in the alternative that, if support were in the record for relief, such relief should be denied because the statute under which appellant would be entitled to relief is unconstitutional.

It has long been the rule that an issue of constitutional dimension may be raised at any time. What is of more constitutional dimension than that of the constitutionality of a statute under which numerous convictions have been set aside?

A careful comparison of the holding in Ex parte Crisp, 661 S.W.2d 944 (Tex. Cr. App. 1983), with the caption of the Speedy Trial Act makes it readily apparent that the State's position not only has merit, (assuming *Crisp* is correct), but that the Speedy Trial Act suffers from the exact malady diagnosed in *Crisp*.[1]

To the majority's denial of the State to have equal access to the Court, I vigorously dissent.

McCORMICK, Judge

Onion, P.J., Davis, and Campbell, J.J., join in this dissent.

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1. Surprisingly, the concurring opinion, in addressing the merits of the State's argument, does what the majority says cannot be done. A reading of the concurring opinion shows the author has completely misread the argument of the State in the instant case and still fails to comprehend Article 3, Section 35 of the Texas Constitution.

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NO. 87-141

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OCTOBER TERM, 1987

THE HON. TED POE,
Appellant

v.

ROBERT JACK COLLIER,
Appellee

Appeal From The Court of Criminal Appeals of Texas
Cause No. 69,739

AMICUS CURIAE MEMORANDUM SUGGESTING THAT THE CASE IS NOT MOOT

JOHN B. HOLMES, JR.
District Attorney
Harris County, Texas

CATHLEEN HERASIMCHUK
Assistant District Attorney

CALVIN A. HARTMANN
Chief, Legal Services Bureau
Counsel of Record

201 Fannin
Houston, Texas 77002
(713) 221-5826

Alpha Law Brief Co., Inc. — 8748 Westpark — Houston, Texas 77063 — 789-2000

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The *amicus curiae,* John B. Holmes, Jr., District Attorney of Harris County, Texas, files this memorandum to advise the Court of certain facts which, while potentially dispositive of the particular case pending, do not render this cause moot since the present controversy is "capable of repetition yet evading review."

At midnight on July 20, 1987, the Second Special Session of the 70th Texas Legislature ended. Thirty days later, on August 19, 1987, any right to a legislative continuance by Robert Jack Collier or his hired attorney, Representative Debra Danburg, expired automatically under the terms of the pertinent statute. Tex. Civ. Prac. & Remedies Code Ann. § 30.003 (Vernon 1986). Once Collier's claim to a legislative continuance expired, the conditional issuance of a writ of mandamus by the Texas Court of Criminal Appeals in *Collier v. Poe,* also expired. Thus, the Honorable Ted Poe, Judge of the 228th District Court of Harris County, Texas, is not presently subject to being mandamused in this case. The aggravated assault charges against Collier have been transferred to the 263rd District Court in Harris County and are set for disposition on September 25, 1987.

One might then conclude that the case now pending on appeal before this Court, *Collier v. Poe,* No. 87-141, is rendered moot. It is not.

As a practical matter, the present case cannot be moot until Robert Jack Collier has been tried. Under the Texas Constitution, the Governor may call a special session of the Legislature at any time. Tex. Const. Art. III, section 5, Interpretive Commentary ("Since regular legislative sessions are somewhat infrequent, there *often* arises a necessity for summoning special sessions in order to provide for urgent matters.") (emphasis added). Thus, if Governor Clements calls another special session of the legislature in the near future, a writ of mandamus could still issue in this case. The threat of renewed legal action will prevent mootness. *See Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n.,* 457 U.S. 702,

704 (1982) (although particular work stoppage no longer in effect, union might resume such at any time; therefore collective bargaining agreement dispute not moot).

Conceivably, the State could prolong the present case by seeking a continuance to maintain a "live" lawsuit in this Court. It would be the height of hypocrisy, however, for the State to delay this or any future trial merely to maintain a "case and controversy" for purposes of judicial review. This is especially true when the basic issue being litigated is the right to a speedy trial by the State and crime victims.

The *amicus curiae,* then, is caught in an untenable dilemma. To prevent further harm to these particular victims, the State must moot the present case with rapidity. To prevent future harm to other victims, the State must present this Court with a viable "case and controversy." Unless this Court invokes the "capable of repetition but evading review" doctrine, justice will not be served by either course of action.

The controversy between these parties is capable of repetition in several senses. First, since the Texas Court of Criminal Appeals held that "the real party at interest in the instant cause is Representative Danburg," it may be assumed that when the next regular Texas Legislature convenes in January, 1989, she will once more be filing motions for a continuance in the appellant's court. Second, based upon both the content and tenor of Judge Poe's Conclusions of Law (Jurisdictional Statement at 37a), it may be assumed that when State Representative Danburg files such a continuance, Judge Poe will once more deny it should he find "irreparable harm" to the crime victims. The *amicus curiae* submits that the dispute

between Judge Poe and Representative Danburg is thus capable of repetition at least every two years in a multitude of criminal cases.

Not only is this particular controversy, between these two individuals, likely to recur with regularity, but precisely the same scenario is capable of repetition between any criminal district or county judge in Texas, of whom there are several hundred, and any Texas senator or representative, of whom there are 181. The inevitability of such future confrontations is sufficient to overcome any supposed mootness raised by the fact that the Honorable Ted Poe is no longer immediately threatened by a writ of mandamus. *See Globe Newspaper Co. v. Superior Court for Norfolk,* 457 U.S. 596, 603 (1982); *Nebraska Press Ass'n. v. Stuart,* 427 U.S. 539, 546-547 (1976).

Texas legislative sessions are typically of short duration, with the regular session running from January to June in odd-numbered years. *See* Tex. Const. Art. III, section 5 (Vernon 1984); Tex. Gov't. Code, section 301.001 (Vernon 1986). Thus, any legislative continuance motion or any mandamus action against Judge Poe for denial of such a motion would expire of its own terms at the end of the legislative session. Any such mandamus order, then, would always evade review because legislative sessions are so short. *Press-Enterprise Co. v. Superior Court of California,* 106 S. Ct. 2735, 2739 (1986); *Globe Newspaper Co., supra,* at 603; *Nebraska Press Ass'n., supra,* at 546-547. *See also Roe v. Wade,* 410 U.S. 113, 125 (1973) (noting that nine month gestation period is so short that the pregnancy will be complete before the appellate process is).

Since legislative sessions are short and the judicial process long, the issue of whether mandatory legislative continuances deny the State and crime victims due process will forever escape review by this Court unless the "capable of repetition yet evading review" doctrine is invoked. *See Press-Enterprise Co., supra,* at 2739.

Recurrent injustice does not become less so merely because it is of relatively short duration. The "irreparable harm" suffered by the particular victims in this case, Jimmy Dale Collier and her daughter Doyelle Maines, cannot be rectified. Nonetheless, this Court should address the underlying issue of whether they or the State have any due process rights to assert in counterpoint to the statutory right of Representative Danburg to a continuance. While mistakes of the past cannot be corrected, those of the future may be prevented.

For this Court to deny review of the constitutional issues presented in *Collier v. Poe* on the basis of mootness would constitute the ultimate Catch-22. The Texas Court of Criminal Appeals held that the State and crime victims have no right to due process in a criminal trial and thus are not entitled to a trial court hearing on any "irreparable harm" caused by a legislative continuance. Should this Court refuse a hearing to review that holding, then the vicious circle would be complete. Not only would the State and crime victims be estopped from showing "irreparable harm" in the trial court, they would be estopped from ever getting this Court to review that denial. That would be true injustice.

Respectfully submitted,

JOHN B. HOLMES, JR.
District Attorney
Harris County, Texas

CATHLEEN HERASIMCHUK
Assistant District Attorney

CALVIN A. HARTMANN
Chief, Legal Services Bureau
Counsel of Record

201 Fannin
Houston, Texas 77002
(713) 221-5826